United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

75-1290

B
P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

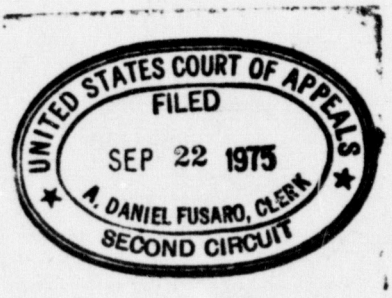
vs.

RUSSELL KELNER,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Appendix



NATHAN LEWIN
Attorney for Defendant-Appellant
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

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4

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Docket Entries	A1
Motion to Dismiss Indictment	A3
Affirmation of Hyman Dechter In Support	A4
Notice of Motion	A7
Affirmation of Ralph S. Naden In Support	A8
Transcript of Testimony	1

Witness	Direct	Cross	Redirect	Recross
Michael Marcovsky	29	40		
William Goldschlag	52	61	67	
John Miller	69	109	137	
Vincent Milaccio	142	145		
John O'Connell	188	191	200	
Arnold Wolf	207	223	230	
Russell Kelner	232	268	297	307
Summation				333

DOCKET ENTRIES

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT JUDGE OWEN 75 CRIM. 200

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Don D. Buchwald, AUSA.
1. RUSSELL KELNER	
	For Defendant:
	~~Barry Slotnick, Esq.~~
	~~15 Park Row~~
	~~New York, N.Y. 10038~~
	Hyman Dechter
	26 Court St. Bklyn N.Y.
	855-7779

STATISTICAL RECORD (12)	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed	Clerk								
J.S. 3 mailed	Marshal								
Violation	Docket fee								
Title 18									
Sec. 875(c)									
Threatening communications.									
(One Count)									

DATE	PROCEEDINGS
5-27-75	Filed indictment.
5-30-75	Deft. (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed at $50,000. P.R.B. secured by $10,000. cash or surety. Case assigned to Judge Owen for all purposes. Pollack, J.
6-11-75	Filed notice of appearance of Hyman Dechter as Atty. for Deft.
6-4-75	Pre-trial conference held. Trial for May 19th 1975.....Owen, J.
6-5-75	Filed Govt's. notice of readiness for trial on or after 5-1-75.
6-9-75	Filed Deft's. motion to dismiss the indictment.
6-10-75	Deft. present w/atty Dechter for trial. Jury selection begun.....
6-11-75	Jury section completed. Jury empaneled & sworn - Trial begun & cont'd.
6-12-75	Trial cont'd
6-13-75	Trial cont'd. & concluded- Verdict guilty. Sentence July 9, 1975 at 2:15 P.M. Bail cont'd P.S.I. ordered .....Owen, J.

-over-

DOCKET ENTRIES 75 CR

	PROCEEDINGS
20-75	Filed Deft's. motion to dismiss the indictment.
-20-75	Filed deft's. affidavit in support of motion to dismiss the indictment.
-20-75	Filed deft's. memorandum of law in support of motion to dismiss the indictment.
-20-75	Filed Govt's. requests to charge.
-20-75	Filed Govt's. proposed examination of prospective jurors.
-75	Filed Defts. Affirmation & notice of motion for an order of acquittal or Judgment setting aside jury verdict.. Ret. 7/9/75.
-75	Filed Judgment & Commitment Order. (Atty present) The deft is hereby committed to the custody of the Atty. Gen. or his authorized representatibe for imprisonment for a period ONE (1) Year. The EXECUTION of said sentence is hereby SUSPENDED and the deft. is placed on Probation for a period of FOUR (4) Years, subject to the standing probation order of this Court. The Deft. is Fined the sum of $1,000.00 to be paid or the deft. is to stand Committed until the fine is paid or he is otherwise discharged according to law.....Owen J. Issued commitment 7-10-75
-75	Deft. present with New counsel Ralph Naden for sentencing. Sentance of Court is as follows:1 Yr. Prison Term E.S.S. Prob. 4 Yrs. $1,000.00 committed Fine.OWEN J.
5-75	Filed memo endorsed on motion filed 7-8-75:This motion insofar as it seeks ... on a claim of ineffective counsel, is withdrawn. The balance of the motion ... See minutes of 7-9-75. So Ordered. Owen, J. M/N
9-75	Filed stipulation of substitution of counsel and agreed between all parties to the action that Ralph S. Naden be and is hereby substituted for the said Hymen ... So Orde red. Owen, J.
16-75	Filed Notice that the deft appeals to the U.S.C.A.P. from the Judgment dated ...

A. Daniel Fusaro
Clerk

By G. E. Thompson
Deputy Clerk

MOTION TO DISMISS INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

RUSSEL KELNER

Indictment No. 75 CR 200

Motion to Dismiss Indictment

The defendant RUSSEL KELNER moves that the indictment be dismissed in that the indictment does not state facts to constitute an offense against the United States. It is based on the following grounds:

1. That the statute (Title 18, United States Code Section 875 (c) is vague, broad, too general, indifinite, unapplicable and this statute does not apply to the conduct of the defendant and thereby the indictment is invalid.

2. Due to the apparent vagueness of the statute and the fact that the statute does not set any standards to aid in the determination of what actions are justified within its framework.

WHEREFORE, the defendant prays that the Court enter judgement quashing said indictment.

Yours, etc.

s/ Hyman Dechter
HYMAN DECHTER
Attorney for Defendant
26 Court Street
Brooklyn, N.Y.
Tel. 855-7779

AFFIRMATION OF HYMAN DECHTER IN SUPPORT

(Same Title)

STATE OF NEW YORK)
)ss.:
COUNTY OF KINGS)

HYMAN DECHTER, affirms under penalty of perjury;

I am the attorney for the defendant RUSSEL KELNER, and I make this affidavit in his behalf.

The defendant was arrested and charged pursuant to Title 18 U.S. Code, Section 875C in that he allegedly threaten the life of another using communicative methods which travel interstate. Specifically it is alleged that the defendant while participating in a news conference threaten to kill another and that the defendant was fully aware of the fact that said communication would be transmitted by certain television media which would cause said statements to be broadcasted in states other than New York.

To deny the defendant the right to express his personal beliefs and to therefore attempt to suppress his Constitutional Rights and freedom of speech violate the essence of the defendant's rights as are guaranteed under the First Amendment of the Constitution of the United States of America. A reading of the statute in question indicates that it is, as the press has so properly labeled it, a "catch all" section. It is submitted that the language of the section itself is over broad and

vague and does not set any standards to aide in the determination of what actions were justifiably lied within its framework.

The evil that is sought to be punished should be the act itself not the words expressing a belief that an act should take place. The Government cannot legally control the thoughts in every man's mind and should not be able to control the transaction of a man's thoughts into words.

The guarantee of free expression under the Fifth Amendment of the United States Constitution is a fundamental that should protect interstate as well as intrastate expressions from the vagaries of censorship. Is it not inconceivable to believe that the defendant would not have been charged if he had stated that the individual in question <u>should</u> be killed rather than <u>will</u> be killed or if he had phrased it as follows: If today were not Thursday, I would kill Arafat.

It appears that the section in question was written to punish those that used telephonic means or other methods of communication to transmit extortion threats, which usually follow the kidnapping of an individual and that it was not the intent of Congress to have the section in question used to suppress the

defendant's freedom of speech. The failure of the section in question to be more definitive and its failure to set standards for interpretations are fatal and require it to be held unconstitutional.

WHEREFORE, it is respectfully requested that the aforementioned motion be granted.

Sworn to before me this
day of May, 1975

s/ Hyman Dechter
HYMAN DECHTER

NOTICE OF MOTION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

RUSSEL KELNER,

Defendant.

----------X

INDICTMENT NUMBER
75 Cr. 200

NOTICE OF MOTION PURSUANT TO RULE 29(c) FOR JUDGMENT OF ACQUITTAL OR ORDER SETTING ASIDE JURY VERDICT.

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affirmation of RALPH S. NADEN, attorney for the defendant herein, upon the annexed affidavit of RUSSEL KELNER, the defendant herein, and upon the entire record of the case, the defendant will move this Court on July 9, 1975, at 2:15 in the afternoon of that day, before the Honorable Richard Owen, United States District Judge, for a Judgment of Acquittal, and for an Order setting aside the Verdict of the Jury, pursuant to Rule 29(c) of the Rules of Criminal Procedure, or for whatever further and further relief which to this Court may seem just and proper.

Dated: July 8, 1975

Yours, etc.,

RALPH S. NADEN
Attorney for Defendant
253 Broadway
New York, N.Y. 10007

AFFIRMATION OF RALPH S. NADEN IN SUPPORT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

RUSSEL KELNER,
Defendant.

INDICTMENT NUMBER
75 Cr. 200

AFFIRMATION IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL.

----------X

RALPH S. NADEN, being an attorney at law duly admitted to practice in the Courts of the State of New York and in the United States District Court for the Southern District of New York, hereby affirms under the penalties of perjury the truth of the following facts:

1. I am the attorney for the defendant herein, having been requested by him to represent him for the balance of these proceedings at the trial level.

2. Since being retained on July 3, 1975, I have had an opportunity to review the entire record of the case, including minutes of the trial of the issues held before the Hon. Richard Owen, United States District Judge. I have had a number of conversations with the defendant and have had ample opportunity to become familiar with the facts of the matter.

3. This motion is brought pursuant to the provisions of Rule 29(c) of the Rules of Criminal Procedure and requests that the verdict of the jury be set aside and a Judgment of Acquittal be substituted therefor. It is alleged herein that prior defense counsel's oral motion upon the returning of the jury verdict suffices to fulfill the time requirements set forth in Rule 29(c).

4. The defendant was convicted of threatening the life of Yasir Arafat, an official of the Palestine Liberation Organization, during the latter's visit to the United Nations in New York City. The threat was allegedly made at a news conference at the office of the Jewish Defense League, an organization of which the defendant is an officer. The statements made by the defendant, and described as a threat, were televised by a crew from WPIX, a New York City television station. WPIX, after editing the film taken, published the film on a news program on November 11, 1974. The decision to publish the film was an "independent determination" of the television station as a news agency, according to testimony taken at the trial.

5. Serious questions of constitutional law and statutory construction are presented in the prosecution of this matter. Additional grounds for error are alleged in support of the

motion herein. Those questions will be presented in the ensuing paragraphs of this affirmation and in the defendant's affidavit which is annexed to this motion.

6. The first argument is that it was not the intent of Congress to include threats made over the television airwaves within the ambit of Title 18, Section 875(c) of the United States Code. The act resulting in Section 875(c) was first passed on May 18, 1934, C. 300, 48 Stat. 781, at a time in history when television was not yet a means of interstate communication and before it was a commonly employed device. It is argued that, rather, Congress intended to include the mails and telephone communications within Section 875(c), the history of the kinds of prosecutions conducted pursuant to the Statute is proof of the proposition. Every prosecution to date pursuant to the provisions of Section 875(c) was based on threats made over the telephone or by mail.

It only makes sense to construe the statute in this manner. From the point of view of being a deterrent to genuine criminal activity, precious few threats, made to occasion fear in another party, are likely to be made over television. Rather, it is in the nature of the evil to be curtailed that the maker of threats is likely not to seek wide publicity before acting, especially when the threat is linked to the

kinds of criminal behavior the statute was designed to combat - extortion, kidnapping, and threats to life based upon personal motive and personal considerations.

Rather than initiating questionable prosecutions, the Government would be better advised to take its case to the Congress, not to the Courts. The application of the Statute in this instance is tortured, difficult, and selective in its choice of a defendant. Congress would be well able to determine if, in its control of the interstate medium of radio and television, an amendment of Section 875(c) were warranted.

7. The second argument is that an independent determination to broadcast the film in question was made by WPIX. The language of Section 875(c) prohibits an individual from transmitting in interstate commerce certain kinds of proscribed threats. It is the defendant's position that he did not transmit the threat in question in interstate commerce, but that in independent intervening force, making an independent decision, was the actual transmittor.

This is not to argue that WPIX is guilty of any crime. Rather, it is argued that WPIX's independent action carries the defendant's statements without the ambit of the statute.That the defendant's organization seems to have called the press conference and that the defendant was unquestionably aware that he was speaking to the press is not germane; WPIX's independent decision demonstrates clearly

that it was not the defendant himself who transmitted the threat in interstate commerce.

8. It is hereby argued that the threat was not communicated in interstate commerce because no evidence was introduced that Yasir Arafat ever heard the threat, had any reaction to the threat, or was induced into a state of fear by the threat. Rather, it would seem that the threat was not communicated to the alleged victim. While the standard of whether a threat induced fear is that of the reasonable man [See, for example, United States v. Rogers, 488 F. 2d 512 ( )], it is argued that in the peculiar circumstances of this matter, the reasonable man standard is inadequate. A well-guarded visitor, under extraordinary security precautions, visiting a City not known as particularly friendly to his cause, can hardly fit the objective standard fashioned by the Courts in most Circuits.

9. In light of that argument, the argument that the defendant's statement crosses the line into political rhetoric, however distasteful, gains credence. With virtual impossibility of the accomplishment of the threat an evident state, first amendment considerations inexorably come into play. Those first amendment

considerations include not only those in the position of the defendant, but those in the position of WPIX, the news-gathering agencies. To prohibit unfettered comment at newsmaking functions is to inhibit the free flow of information mandated by the First Amendment of the Constitution. It would occasion, moreover, a chilling effect on the speech of those who, by virtue of political positions taken and espoused, fear prosecution if a threat were made to injure the person of another. It is believed that many such threats, or language that conceivably could be construed as such threats, are made by many individuals whose words are reprinted and memorialized by the news media every day. The Constitution stands between the freedoms guaranteed by its provisions and attempts to curtail the exercise of those freedoms.

10. The defendant further argues that bad faith by the prosecution in the cross-examination of character witnesses justifies the granting of this motion. During cross-examination of several character witnesses, the Assistant United States Attorney asked whether the particular witnesses, in the formation of their opinion about the defendant's character, had heard about an arrest of the defendant for Assault on an Egyptian diplomat. These questions are believed to have been asked in bad faith. The basis for that statement

is material produced in the Probation Report prepared for the sentencing proceeding, which states that the United States Attorney declined prosecution of Mr. Kelner because it was believed that the complaining witnesses were not telling the truth about the incident and, in fact, had assaulted Mr. Kelner and one other, rather than being assaulted by Mr. Kelner. The incident occurred during an otherwise peaceful demonstration against the policies of the Egyptian government vis-a-vis the State of Israel; unfortunately for Mr. Kelner, this otherwise peaceful demonstration included a sit-in inside the Egyptian mission to the United Nations, an invasion which resulted in the abovedescribed assault. That invasion was doubly unfortunate, for the prosecution in this case was able to make use of what it had earlier concluded was a criminal complaint based on untruths. Use of that incident in cross-examination of character witnesses contributed mightily to the destruction of their credibility; a reading of the minutes of the trial shows clearly how effectively the Assistant United States Attorney was able to use the material to shed doubt on the objectivity of the character witnesses.

11. These are the grounds upon which the defendant is asking this Court to grant the within Motion for a Judgment of Acquittal and to set aside the jury verdict in this case. I also request that in considering the validity of that motion, the Court consider the affidavit of the defendant that is annexed hereto; that affidavit prepared by him alleges one additional ground upon which

the Court is asked to grant the within motion. The argument is made that the defendant suffered from ineffective assistance of counsel within the meaning of the Sixth Amendment to the Constitution of the United States and of case law explicating that term and that, in the least, he is entitled to a new trial.

12. The final ground raised in this motion is that of selective prosecution. It is alleged that the Government acted arbitrarily and capriciously in initiating prosecution of this defendant on these charges. It is alleged that the prosecution of this defendant was an act of intentional and deliberate discrimination against him because of his activist position within the Jewish community. A motive for such conscious selection of this defendant for prosecution may be found in the actions of this defendant and the Organization of which he is a part - the Jewish Defense League. That organization has taken strong, militant positions with regards to nations with which the United States wishes to conduct relationships according to its own interests, as seen by those responsible for national policy. To the extent that the Jewish Defense League has demonstrated against other nations, has plagued the emissaries of those nations with the stern message of American Jewish interest in Middle Eastern and Soviet opposition to Jewish interests, it can be seen as a thorn in the side of international political relationships.

Whether or not the prosecution of this defendant resulted from foreign policy considerations, no justification exists for having selected this defendant for prosecution under a questionable statutory application.

WHEREFORE, the defendant requests that relief be granted as requested, that this Court grant the Motion for a Judgment of Acquittal and set aside the verdict of the trial jury, and grant whatever other and further relief which may seem just and proper under the circumstances.

Dated: July 8, 1975

Ralph S. Naden

RALPH S. NADEN
Attorney for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

- v s - : 75 Cr. 200

RUSSELL KELNER, :

Defendant. :

----------x

B e f o r e :

HON. RICHARD OWEN,

District Judge.

New York, N. Y.
June 11, 1975 - 12:30 p.m.

A p p e a r a n c e s :

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York;
By: DON D. BUCHWALD, ESQ.,
Assistant United States Attorney.

HYMAN DECHTER, ESQ.,
DAVID J. MANDEL, ESQ and
HARRY L. BROWN, ESQ.,
Attorneys for Defendant.

[A jury of twelve and two alternates were duly impaneled and sworn.]

[The jury entered the courtroom.]

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: You may, Mr. Buchwald, but before you do, let me first make a few preliminary comments:

Now ladies and gentlemen, let me say this: This is particularly for the benefit of those of you who have never sat on a jury trial before.

The case will proceed, I am sure, in the following order. The Government is going to make an opening statement outlining its case. This is in the nature of a road map to you of where it expects the proof will go.

Then the defendant may make an opening statement outlining his case, although he is not required to.

I want to say that any opening statement that is made to you is not evidence in the case but is merely as an aid to you in understanding the nature of the case and the significance of the evidence when it is received.

After the opening statements the Government will introduce its evidence in support of the charge.

At the conclusion of the Government's evidence the defendant has the right to introduce evidence, although he need not do so.

Rebuttal evidence may be introduced.

At the conclusion of all of the evidence the attorneys may make closing arguments to you, and after the closing arguments I will give my instructions on the law, and at that time you will deliberate and arrive at a verdict.

Now during the course of this case please keep a completely open mind. Do not conclude from hearing one witness on one side of the case that you know all about it. What you may hear from a later witness may add to or subtract from what you thought you learned from an earlier witness. What you may hear on cross-examination may add to or subtract from what you thought you had learned from the direct examination of that witness.

Do not discuss the case with each other, as I have said, anything having to do with this case, until it is completely submitted to you. One reason for that is that if you start verbalizing and you start talking about it, you begin to form fixed opinions which you then may feel that you have to defend, or you may have to abandon, and that you are perhaps stuck with it in some way. Don't talk about the case amongst each other or with anybody else. Blame it on me. Just say the Judge said not to do it, and you are not going to do it.

Now, the best way, in my judgment, is to just

let the facts fall into place like leaves on a lawn in autumn.

When the case is submitted to you, at that time then you should begin to sort them out and begin to reach the conclusions you feel are justified under my instructions.

During the course of the trial the attorneys will make objections, I am sure. You are to draw no inference from any objection that is made. That is the attorney's duty. Nor are you to draw any inference from any ruling I may make on an objection . That is my job.

As I said, openings and summations to you are not evidence, nor are questions to which answers are not permitted. You are to decide this case only on the evidence, and that means from the answers to the questions, from the documents and other exhibits that are properly admitted in evidence, or the lack of evidence, as the case may be.

One final word: During the course of the entire trial, just because you are now in the jury box, you do not leave your common sense in the hallway. You keep that with you and apply it all times.

All right, Mr. Buchwald, you may proceed.

OPENING STATEMENT ON

BEHALF OF THE GOVERNMENT

MR. BUCHWALD: May it please the Court, your Honor, Mr. Dechter, Mr. Miller, Madam Forelady, ladies and

gentlemen of the jury:

Let me start by re-introducing myself. My name is Don Buchwald; I am an Assistant United States Attorney, and I will be presenting the Government's evidence in this case.

Now, the purpose of an opening statement, as his Honor has indicated, is to present something of a road map. I think it is more helpful to look at it as sort of a cover on the box of a jigsaw puzzle. You see the picture right on top, and that helps you to figure out where the individual pieces fit in.

The indictment in this case charges the defendant essentially with having threatened to injure Yasir Arafat, specifically having threatened to assassinate him or cause to have him assassinated; having caused --

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

MR. DECHTER: Objection.

THE COURT: Overruled.

MR. DECHTER: Exception.

MR. BUCHWALD: [continuing] -- and having caused this threatening communication to be transmitted in interstate commerce.

It is this last aspect, ladies and gentlemen,

is the reason why a case like this is in the Federal Court as opposed to State Court - the interstate commerce aspect.

Now ladies and gentlemen, far and away the most significant piece of evidence that the Government believes will be presented to you is a film and a sound track of the actual statements by the defendant which the Government contends contain these threats.

Now, before I describe that film to you, as I would like to do, let me put it a little bit in perspective. Under the law it might be most helpful at a trial if you could just show the film right away, and then each of the witnesses would take the stand and say what they know about what was on the film. In the law that is what they call laying a foundation. But first you have to put in certain evidence, and then the film comes in, and then, hopefully, a little more evidence.

To put the film here in a little bit of context, the Government will prove that on November 11, 1974, a press conference was called in the offices of the Jewish Defense League here in Manhattan. This was in the beginning of the week in which Yasir Arafat was to address the United Nations. He was due in and due to speak in the General Assembly of the United Nations.

Now, various members of the media, radio and

television, were asked to attend this press conference, did attend the press conference called at the JDL Office, and this time at the JDL Office, Russell Kelner, the Government will prove, made certain statements, including the threat to assassin Yasir Arafat, which will be presented on the film.

Now, if those are the statements which were filmed and telecast by WPIX, Channel 11, you are going to see for yourselves during the course of the trial.

You will hear that at the press conference among others was a young reporter from WPIX, Channel 11, by the name of John Miller. Mr. Miller is going to testify here. Mr. Miller had gone down to the press conference with a camera crew - I think it is a sound man and a camera man and a light man; he was one of the representatives of the media who was present at the press conference. And it was there, as you shall see, that the defendant looking into the WPIX camera and speaking into the WPIX microphone made the statements, statements threatening to have Arafat assassinated.

And the Government will prove that the defendant in making those statements into the camera, into the microphone, at the press conference called at JDL Headquarters, expected and fully intended that those threatening statements

will be transmitted in interstate commerce, as, in fact, they were that night on WPIX Television during the late news.

During the trial the Government will have to prove, and it will prove, ladies and gentlemen, that Channel 11 is indeed -- will prove that a broadcast, a telecast on Channel 11 is, indeed a transmission in interstate commerce. There is going to be some evidence about the broadcast range of Channel 11 and the fact that --

MR. DECHTER: Objection, your Honor.

THE COURT: No, overruled.

MR. BUCHWALD: -- the fact that transmissions from here, in New York, telecast, you can see them in New Jersey and Connecticut and other states as well.

The most significant thing, however, will be the film itself; the evidence that Kelner made the statement, threatening statements, and statements which he intended as a threat.

The film is only about a minute or so in duration, a minute or a minute and a half in duration. You will see right at the beginning of the film the press conference at the JDL Office. On the table in front of Mr. Kelner as he speaks is a gun and a holster. And Mr. Kelner is surrounded --

MR.DECHTER: Objection, your Honor.

THE COURT: Overruled.

MR. BUCHWALD: -- by two other men who are at his side, I assume associates, as he was making the statement.

You will hear Kelner's words, words which include "We have people who have been trained and who are out now and who intend to make sure that Araft and his lieutenants do not leave this country alive."

You will hear him in response to a question: "How do you plan to do that? Are you going to kill him?"

The response is: "We will do it. I can't tell you the details. It's going to be done; there will be justice."

You will hear him say in response to further questions: "We are planning to assassinate Mr. Arafat."

When he is asked: "Do you have people picked out for this? Have you planned it out? Have you started this operation?" He said: "Everything is planned in detail."

In response to other questions he says: "It is going to come off."

When he is asked to elaborate on the plans, he says, "If I elaborate it might be a problem in bringing it off."

Now, ladies and gentlemen, the Government with the aid of a film you will see will prove that the defendant

made those statements. In short, the Government will prove that the defendant made the threat to have Arafat assassinated; that he intended in making those statements to convey the threat, and that he did so with the intention and expectation that his words would be telecast in interstate commerce, as, in fact, they were on WPIX that night.

Now, ladies and gentlemen, I ask you, even though the film is very, very short, I hope that perhaps we can have it played more than once to really focus in on the film, on Kelner's words, on his tone, intonations, the circumstances depicted in the film, the context of his words, because when all is said and done and the lawyers are finished talking, the real issue you will decide is, was this simply the expression of an opinion in very strong terms or was it, as the Government alleges, a threat to have Arafat assassinated?

Finally, ladies and gentlemen, let me say that I am sure that you understand in a society such as ours which exists under the rule of law you can understand the importance of a case such as this to the Government, and I am sure that you equally understand the importance of any criminal case to a defendant on trial.

I ask you to give all of the evidence your careful attention, as I am sure that you will do, and I thank you for your attention now.

MR. DECHTER: May it please the court, your Honor, Mr. Buchwald, ladies and gentlemen of the jury:

Good afternoon. It seems like we are getting into the lunch hour.

Let me state from the onset that what Mr. Buchwald just told you is what he thinks. It is his opinion. He will have to stand by that. That's fundamental.

It is your obligation, and you have sworn under oath to fulfill that obligation, that you are going to hold him to that proof, to that proof, beyond a reasonable doubt and to a moral certainty. He must be held to that because he represents the United States Government and the United States Government has indicted Russell Kelner.

An indictment, as you know, is equal to a summons to get him into court. It is equal to a summons for a $5 bill in civil court and night court. That's as much effect as it has as far as evidence goes.

The evidence will be adduced from the witness stand. That's where you are going to here. Not from pictures. Pictures are what people perceive that to be. That's a judgment you will make. Your

pga2

common, everyday experience is not left out when you walk into this courtroom.

By the way, each one of you is a judge, without going to law school, without passing the bar, and without going through the arduous task of becoming a federal court judge. You are the judge of the facts and the judge will tell you the law and you are to apply the law accordingly.

What I say or what Mr. Buchwald says is not evidence. My statement, his statement, is not evidence.

Let me state also that it becomes fundamental in this case wh ether in this society today, at a time when we have the terrible mess of Watergate and the repressive era of the Nixon administration, if a person expresses his belief, even though one can argue with that belief, if he says it strongly and if he says it emotionally, if he says it with his heart, because he is concerned, is that in any way a threat? That's what you are going to have to decide, whether there was a threat.

You heard Mr. Buchwald state whether this was a threat or whether it was a matter of opinion.

Of course I will attempt to prove that it

pga3

was a question of opinion, it was a matter of lack of intent, because I will show that Mr. Kelner is a responsible man who was in his office, who did not respond to reporters or TV people personally. He was asked questions.

It is interesting that some of the questions he was asked -- I would like to read from the complaint. The question specifically stated:

"Reporter: How do you plan to do that? Are you going to kill him?

"Kelner: I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist but should exist."

I ask you, does that sound like a threat?

"Reporter: Are you saying you plan to them?"

I'm sure Mr. Buchwald didn't happen to read that part.

"Answer: We are planning to assassinate Mr. Arafat just the way any other murderer is treated."

I submit that the inflammatory statements made by the reporters provoked responses in Mr. Kelner, a man with deep conviction and concern, a man who I will prove has an excellent background, excellent educa-

pqa4

tion; and because he has the integrity that unfortunately in this society some people would not have he is today on trial here. It is his integrity which saves our anger and frustration at what is happening here.

Again, we must take this as a whole. What was happening around November 11th? I am sure each one of you will recall.

MR. BUCHWALD: I object on the ground that this sounds much more like summation than opening.

THE COURT: It does. Please confine yourself to opening with what you expect to prove.

MR. DECHERT: I will try to do that, your Honor.

At around November 11th you will recall one Yasir Arafat, head of the murderous PLO -- this is a fact, and you are well aware of it -- was coming into the United States to address the sanctimonious body called the United Nations.

MR. BUCHWALD: Again I will object. This is totally inappropriate for an opening statement.

THE COURT: I agree.

MR. DECHERT: I withdraw that statement.

I respectfully state that what happened was

pga5

because he did not know, and we will prove that, he was not privy, he is not with the government, he is not an FBI agent -- I assume the FBI knew when he was coming in. Mr. Kelner did not have any such information. Therefore, for one to make a threat to be carried out in any way one would have to know where, when and how.

If you will recall that time -- I will show, and I will prove, by even the prosecution witnesses that there was no such time that one knew exactly or even within a 24-hour period where and when Mr. Arafat was going to come to the United States.

I will further prove that Mr. Kelner exercised his rights under the First Amendment, and that's his inalienable right, when he stated -- and what he stated had no further effect, I respectfully state to you -- I will show that Mr. Kelner, for a few days before and even a day after the arrival of Mr. Arafat, never even left his office other than to go to his home.

Does this show any man making a threat?

I will show that if one would even argue -- and that is extremely arguable, whether there was interstate commerce, whether it was communicated, if

pga6

a man is going to make a "threat," does he go on television a day or two in advance? I will show that he did not have any intent to go on television, to make any threat at all. That is not what happened. What happened was he was responding.

We will show that Yasir Arafat has been an open assassin, a murderer, a despicable human being who the world well knew and the United States Government had an obligation to arrest when he landed here because the fact was he was responsible for a murder in Khartoum of an American ambassador.

MR. BUCHWALD: I would object once again.

THE COURT: Sustained.

MR. DECHTER: I would show that Mr. Kelner, this peaceful man, who has a job which requires office management -- that's his job; he is employed by the Jewish Defense League as an office manager and nothing more and nothing less -- I will show that his statements in terms of "We're planning to assassinate Mr. Arafat" -- in terms of making that statement, it was not in any way fact.

I will show that what Mr. Kelner stated was an inflated, possibly, argument. One would say that was his own personal feelings, motivated by deep

pqa7

passion, but not motivated by a threat at all. He was puffing. A man in his position where he suddenly is confronted -- and has no experience dealing with the press -- by the reporters who want to have sensational stories -- WPIX has that notoriety. They are asking him and pressuring him for a statement and he makes this statement. He does this without any intent.

You must remember that intent, and that will be something for the court to instruct you on, that's most important. One cannot take this statement by just showing the film again. It will have to be taken in the context of the whole situation before that date, within that date, and possibly a day later, how was it together?

Each one of you know -- let's say, for example, you have an expensive vase and your child throws it over --

MR. BUCHWALD: I object.

THE COURT: This is not opening.

MR. DECHTER: I apologize.

One makes statements at times when they are pressured and under stress. I have said to my wife I'm going to kill her. Does that mean that

pga8

I'm going to kill her?

MR. BUCHWALD: Same objection. It's been made half a dozen times. Mr. Dechter continues to disregard that.

THE COURT: Please, Mr. Dechter, just what you intend to prove.

MR. DECHTER: Your Honor, the indictment would indicate that Mr. Kelner wilfully and knowingly transmitted and caused to be transmitted in interstate commerce a communication. I intend to prove that there was no wilfulness, there was no transmission, because he didn't go to the television studio with a statement. He didn't transmit anything. It says here "transmitted." He transmitted. If anything, I will show that if one would even argue that that is allowable, I would argue that the fact is that WPIX had the ability to do what they thought they wanted to do. They put this one. They were not urged by Mr. Kelner. He had no control over the executives.

MR. BUCHWALD: I will object.

In addition, on the ground that that is totally irrelevant as a matter of law.

MR. DECHTER: Not at all, your Honor.

pgn9

THE COURT: I will charge on what constitutes the law applicable here. Overruled.

You may urge this as what you intend to prove.

Proceed.

MR. DECHTER: Further, you have an obligation. You must be aware of that. There is a presumption of innocence in the question of Mr. Kelner. Any defendant in any criminal case has that presumption. There is a presumption and a cloak which he holds around him that no shiek in the world can take away. The fact remains it is a cloak, a presumption of innocence, which is unbelievably important and financially can never be bought. In this democracy, that's the basis for the democratic government. That's a presumption of innocence. The government must show beyond a reasonable doubt that they have overcome that presumption. That's their responsibility. And if not, you, each and every one of you, must come in with your own personal verdict of not guilty.

Further, every element of this crime, if one is to call this a crime, and I say this is not, I state to you that we are dealing here with a political situation.

MR. BUCHWALD: Objection. What Mr. Dechter says is not relevant.

MR. DECHTER: I state to you that every element of this particular so-called crime must be proved beyond a reasonable doubt. The court will instruct you accordingly. It states the United States of America against Russell Kelner. Think about it. The United States of America. 230 million good Americans against one man, Mr. Kelner.

The effect of it is that with the tremendous resources of the United States Government, the FBI, the investigative staffs, the competent people, the kind of communications they have, all this is something that every criminal case in the federal court has. Therefore, it is incumbent in a fair democratic society in every case that Mr. Kelner has the right to be presumed innocent and that in order for there to be any conviction at all it must be beyond a reasonable doubt. We will not go into that too much at this point. I believe that the court will instruct you accordingly.

Let me put it more simply. If we know anything about baseball, Mr. Kelner, because of our system of justice, starts out with one run. Right

now he's ahead. By the very nature of the fact that the government has so many resources at their disposal and he does not, he's ahead. And the fact that he's in court today, he has one run ahead. That's what our Constitution is based upon. In a criminal case, unlike a civil case which has to do with money damages, which is not that important, because, God forbid, if you do lose in a civil case it's only money -- we are talking about something else here.

Therefore, he starts out a run ahead and in order for the government to prevail not only must they come within that run, they must come in with two runs. They must come in with more than just equal. They have a tremendous burden.

You must recognize that I have no obligation, nor does Mr. Kelner, to take that stand. As a matter of fact, I did not even have to make this opening statement. I could have stood right here and let Mr. Buchwald prove his case. I could have left Mr. Buchwald say what he wanted and leave it to your good judgment, which I believe you have.

I have in very few cases been in front of a jury that seems to be as intelligent as you are. By the way, I must say this. If anything I personally do

or say is offensive to anybody, please, it's human, do not hold my client, Mr. Kelner, responsible for that. Be objective. Please know that we are looking for an impartial and fair trial.

So that in the case of Russell Kelner it is my contention, and it will be proven, there is nothing that the government will be able to produce that can possibly sway your mind because we are living in a time when people are aware that even though we are in an important court it does not mean that the very fact he is sitting here, where there is smoke there is fire. Absolutely not. I am sure you don't believe that.

The fact remains that the People will have to prove their case. If there is an FBI agent that is to be taken into consideration, it is nothing more, nothing less than any other witness. We will have witnesses for Mr. Kelner who do know him and in fact should not deny him the good name he has. It should be considered in your deliberations.

Also, when one considers the tremendous political times we are living in and that this case, although it seems that the United States attorney will attempt to make it just another case, someone

snatched a $5 bill --

MR. BUCHWALD: I object.

THE COURT: Sustained.

MR. DECHTER: This case is important. It has international implications. It is an important situation. It is one that has to do with fundamental beliefs.

MR. BUCHWALD: Objection again, your Honor.

THE COURT: I sustain the objection.

This case is important both to the defendant and to the government. It should be regarded accordingly.

Proceed.

MR. DECHTER: If I can say this: It has more than that. Every trial is important. But we are dealing again in fundamental beliefs and we are dealing again in freedom of expression. What you must consider when you weigh all the evidence is whether there was a threat, because it is my contention that there was no threat and therefore the people have not proved their case, and therefore you have no other choice than to acquit my client, Mr. Kelner.

Furthermore -- I don't want to be redundant; it's coming close lunch hour -- I think it's important

though that I leave nothing out.

Just yesterday a judge in the Supreme Court --

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: There have been statements and one cannot ignore that the Palestine Liberation Organization is part and parcel of this whole situation.

MR. BUCHWALD: Again I object.

THE COURT: Is this a quotation from another court?

MR. DECHTER: No. I make my own statements. No quote.

MR BUCHWALD: I will stand so I'm up here already.

MR. DECHTER: Please sit down. I would appreciate that.

THE COURT: Sit down and rise when the occasion justifies your rising.

Proceed.

MR. DECHTER: We are dealing at this time with a most important political situation. One cannot ignore this. This case is not in a vacuum. I'm sure that most of you, if not all, have

read about this case one way or the other. Maybe you do not recollect because you read so many cases --

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Confine yourself to what you are going to prove.

MR. DECHTER: Your Honor, I respectfully state to the court that it not confine me in a case of this sort which has international --

MR. BUCHWALD: I object to this.

THE COURT: Sustained.

You have much greater latitude in summation. We are not in summation.

MR. DECHTER: I appreciate that. I am sorry and respectfully apologize.

After all the evidence is in, when you see all the credible evidence, where is it going to come from? From that stand. It is not going to come from words read from a text. It is not going to come from a movie or a television broadcast. It is going to come from both sides. This man, Mr. Kelner, voluntarily will take that stand. He has nothing to hide. He will tell you what he said.

After you have heard all the believable,

credible evidence and after you have examined in your minds and in your consciences and hearts what this means and what Mr. Kelner said as compared to what the government claims he said -- that's their interpretation, they are going into a man's thoughts -- I state you will have no other position, and I'm sure that as intelligent human beings, after you hear all the evidence you will know that Mr. Kelner made no threat, intended no threat, did not attempt to make any threat, he did not communicate any threat. As a matter of fact, he did nothing more than express his opinion and therefore I'm sure that you are going to acquit my client, Mr. Kelner.

Thank you. Good afternoon.

THE COURT: Ladies and gentlemen, we are going to break for lunch until 20 minutes past 2.

In terms of starting here, it is obviously important that all 14 of you be available at 20 minutes past 2 and ready to go through that door so we can utilize our time most effectively.

Sometimes the lawyers have matters of law that they want to discuss with me before you come in and we may have to hold you, but I trust that will not occur too often and that we will be ready to begin

right on the dot.

As I said last night, there may be matters concerning this case in the public press. You are to avoid reading anything. You are directed not to read anything concerning this case in the public press. You are to decide this case only on what you hear in this room.

Keep that admonition in mind. Keep an open mind. Do not discuss it with each other or with anyone else and I will see you at 20 after 2.

(Luncheon recess.)

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AFTERNOON SESSION

[2:20 p.m.]

[In the robing room:]

THE COURT: Now, you are missing your first witness?

MR. BUCHWALD: No, they are here. They were in the spectator gallery as opposed to the witness room, but they are here.

THE COURT: So you are ready to go?

MR. BUCHWALD: Yes.

THE COURT: I was afraid they were not here.

MR. BUCHWALD: My apologies.

MR. DECHTER: May I ask you to do this. Every time we come in here the jury seems to think something strange is happening here having to do with this case. Would you instruct them that there is nothing at all they should consider --

THE COURT: I will do it if it becomes necessary.

[End of robing room discussion.]

[In the courtroom in the presence of the jury:]

THE COURT: You may proceed.

MR. BUCHWALD: At this time the Government calls

Mr. Michael Marcovsky.

M I C H A E L M A R C O V S K Y , called as a witness in behalf of the Government, being first duly sworn, testified as follows:

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. BUCHWALD:

Q Mr. Marcovsky, by whom are you employed?

A WPIX Incorporated.

Q What is WPIX?

A It is a company that owns broadcasting stations.

Q In New York, specifically, is there a television station which WPIX Incorporated owns?

A Yes.

Q And what station is that?

A WPIX.

Q And what channel is that?

A Channel 11.

Q In what capacity are you so employed, sir?

A I am assistant to the president.

Q And were you so employed on November 11, 1974?

A Yes, sir.

Q Does WPIX, Channel 11, have any news programs?

A Yes.

Q And what times during the day are these news programs telecast?

A Approximately seven in the morning, ten at night and 12:30 a.m.

Q And with respect to the ten p.m. news program, did WPIX also have a ten p.m. news program back in November of 1974?

A Yes, sir.

Q Where does WPIX broadcast from? Where is the studio?

A The studio is at 220 East 42nd Street in Manhattan.

Q Is it transmitted from the Empire State Building?

A Yes, sir.

Q I take it that this was the case in November of 1974 as well?

A Yes, sir.

Q Is WPIX, Channel 11, licensed by the Federal Communications System?

A It is an FCC licensee.

Q What is the broadcast range of Channel 11?

MR. MANDEL: Your Honor, I will object to this line of questioning on behalf of the defense unless there is

some foundation relating it to this case.

THE COURT: Overruled.

Q What is the broadcast range of Channel 11?

A Approximately 27 counties in the Metropolitan area.

Q Are those limited to counties in New York State?

A No, sir.

MR. DECHTER: Objection, your Honor to leading questions on the part of the Assistant U. S. Attorney.

THE COURT: Let's make it not leading. Sustained

Q Where are those counties located?

A In New York State, Connecticut and New Jersey.

Q In terms of miles from the Empire State Building, about how far out is the broadcast range of WPIX?

A Approximately 50.

Q In all directions?

A Yes, a radius of 50 miles.

Q Have you yourself personally seen any television programs on WPIX, Channel 11, while in states other than New York?

MR. DECHTER: Objection, your Honor. It calls for a self-serving statement, and I respectfully ask the Court not to rule that that is not a question which should be admitted.

THE COURT: Overruled.

MR. DECHTER: Exception, your Honor.

A Yes.

Q From what states other than New York have you seen programs while watching Channel 11?

A Connecticut and New Jersey.

MR. BUCHWALD: If we might for present purposes, your Honor, have the reel of film deemed marked as Government's Exhibit 1 for identification?

THE COURT: Yes.

[Deemed marked Government's Exhibit 1 for identification.]

MR. BUCHWALD: And, sir, if I may ask you to step down for just a moment.

[The witness steps down from witness chair.]

Q Are you able to identify the film on this reel, some of which has now been put onto a second reel?

A Yes.

Q And without reading any notes on the film, how are you able to identify it?

A That is the only way I can identify it at this point.

Q From certain writings on the film itself?

A From markings on the leader of the film.

MR. BUCHWALD: Sir, you might resume your seat.

[Witness returns to witness stand.]

BY MR. BUCHWALD:

Q May I ask you where you obtained this film from?

A From our Film Department.

Q Of WPIX?

A Yes, sir.

Q And do you know what it is a film of?

A It is a --

MR. MANDEL: Objection, your Honor; best evidence rule.

THE COURT: Sustained.

Q Do you know whether or not this is an original film?

MR. MANDEL: Your Honor, the question is compound and it is leading.

THE COURT: That is sustained, too.

BY MR. BUCHWALD:

Q Mr. Marcovsky, when did you first see this film?

A November 11, 1974.

Q And where were you when you saw the film?

A At WPIX.

Q Is it the practice of WPIX to keep and maintain films of this sort?

MR. MANDEL: Objection, your Honor.

MR. DECHTER: On the basis not what the general practices are but whether it pertains to a particular case.

BY THE COURT:

Q Mr. Marcovsky, was there a broadcast by WPIX on the evening of November 11, 1974, a news broadcast?

A Yes, your Honor.

Q Is this the film of that news broadcast?

A This is the film that was used on that broadcast.

THE COURT: Go ahead.

BY MR. BUCHWALD:

Q Is it the original film that was used on that broadcast?

MR. DECHTER: Objection, your Honor, as to leading.

THE COURT: No, overruled.

A Yes, sir.

Q There are original films which are used in WPIX broadcasts made and played by WPIX during the normal course of its business day?

A I know on general basis. That's a detail of an interdepartmental operation.

Q Did you yourself observe the film as it was broadcast on WPIX on November 11, 1974?

A Yes, sir.

Q Since November 11, 1974 where has this film been, if you know?

MR. DECHTER: These questions have been asked and answered. I believe there is sufficient testimony on this.

THE COURT: Overruled.

Read it back.

A Most of the time in my possession.

Q Are you aware of any times when it was out of your possession?

A Yes.

Q When since November 11, 1974, has the film been out of your possession?

A A copy of the film was made by a laboratory process outside the station.

Q Did you cause this original film, Govern-

ment's Exhibit 1 for identification, to be sent out so that a copy could be made?

A Yes, sir.

Q Prior to doing so had you caused WPIX itself to make any copy of the film?

A I don't really recall.

Q Do you know whether a video tape of the film was ever made by WPIX?

A I can't be certain. It may have been.

Q How long was the film out of your possession all told while it was sent out for a copy?

MR. DECHTER: Your Honor, we concede there is such a film. To go into this would be wasting the time of the court.

MR. BUCHWALD: That's satisfactory to the government.

THE COURT: Proceed.

Q Did there come a time when you furnished, pursuant to a grand jury subpoena, a copy --

MR. DECHTER: Objection, to the very nature of what I just said. We conceded that.

THE COURT: What is your concession?

MR. DECHTER: The fact is that there is such a film and that's it. After that I think any

statements made by the United States attorney would be repetitious and at the same time --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: Do you concede that Exhibit 1 is the film that was shown on that date?

MR. DECHTER: Yes.

MR. BUCHWALD: That's satisfactory.

Our only intention was to have the copy marked, identified, as a true copy. I understand that they both require different projectors to play. In the event --

MR. DECHTER: We are not objecting to that. We will go along with that.

THE COURT: Your concession is that this is a fair and accurate representation of what was aired on the telecast?

MR. DECHTER: If it is not, we will know it from the minute we see it. We assume it is.

(In open court.)

MR. BUCHWALD: Would it be appropriate to have that stipulation at the side bar read to the jury?

THE COURT: Absolutely.

MR. DECHTER: Respectfully, your Honor, I ask to go to the side bar.

(At the side bar.)

MR. DECHTER: Where we already stipulate and we have side bar conferences I feel it would be difficult to accept the same thing we say at the side bar, which is supposed to be more or less confidential to ourselves, and to use it for the jury. One of the reasons we are doing that -- we didn't do that in any other case.

THE COURT: Obviously, your stipulation is a concession of facts. The jury is to be informed of that. Let's put the concession on the record in the jury's hearing.

MR. DECHTER: When I said that I conceded it -- to do this means that --

THE COURT: State whatever it is that you stipulate right now with a view toward having it read to the jury.

MR. DECHTER: I concede at this time that whatever film, Government's Exhibit 1, is a duplicate or original, and I concede that is the film that was shown at this time, without making any further admissions other than the fact that that's the film that

was made at that time, November 11, 1974.

THE COURT: Obviously the jury has to be told that the foundation has been laid and that may be read.

MR. DECHTER: Yes.

(In open court.)

(Record read.)

BY MR. BUCHWALD:

Q I believe you testified to this effect already but did you in fact see the telecast of the 10 p.m. news on November 11th?

A Yes, sir.

Q Was this film part of that telecast?

MR. DECHTER: Objection to the same question.

THE COURT: Overruled.

A Yes, sir.

Q Where were you physically at the time you saw the telecast?

A In the studio control room.

Q Mr. Marcovsky, does SPIX ever receive any news information and reports from any of the wire services?

A Yes, sir.

Q Does that include United Press International?

A Yes, sir.

Q Was this also the case back on November 11, 1974?

A Yes, sir.

MR. BUCHWALD: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. DECHTER:

Q Mr. Marcovsky, you are the assistant to the vice president?

A Assistant to the vice president.

Q Your function is what?

A To help him in his management duties at the company.

Q Specifically, I refer you to the date of November 11, 1974. Do you recall that date?

A Yes, sir.

Q Will you please tell the court why that particular date stays in your mind as compared to any other date?

A You were just asking me questions about that date.

Q Why does that particular date stand in your

mind. Every day you have news programs?

A Yes.

Q What makes this date, November 11th, different than any other news day?

MR. BUCHWALD: I will object to the form of the question.

THE COURT: Overruled.

Q Did you have discussions with the United States attorney, Mr. Buchwald?

A Yes, sir.

Q Would you tell the court and jury at what occasion? More than once?

A Yes, sir.

Q Was it in and around the period of November 11th?

A No, sir.

Q Subsequently? Can you approximate the dates?

A It was some time about the time that we were being subpoenaed for film for the grand jury for this trial.

Q Have you met Mr. Buchwald more than a few times? More than once?

A No, sir. The second time would be today.

Q Did you testify on direct that you personally observed the film of that evening?

A Yes, sir.

Q Could you tell us if you observed it on November 11th or subsequent to that date?

A Both, sir.

Q Do you recall what happened on November 12th, the newscast of November 12th? Could you tell the court what was on the newscast on November 12th?

A I don't recall.

Q So then again I ask you, what makes the November 11th news broadcast stay in your mind.

A The fact that it contained film that we have been subpoenaed on, that our news film has been subpoenaed.

Q Did you send out any reporter or did you yourself go down to any office?

A I did not personally go down to any office, nor did I personally send out a reporter.

Q Would you please tell the court how the film arrived in your office?

A After the newscast of November 11th --

Q I did not ask that.

A Repeat the question.

Q Prior to the news broadcast was there a

time when certain film was delivered to SPIX?

A Prior to the broadcase was there certain film delivered to WPIX? I would not know the details of that, sir.

Q It requires a yes or no answer.

A Our news crews go out and take film and bring it back to the station and it is processed and broadcast.

Q Was the film brought, to the best of your knowledge, to your office or not to your office but to your station?

A Yes. It was brought back to the station.

Q This was not a live broadcast, was it?

A The news was broadcast live and it contains film elements.

Q I asked you if this was a live broadcast at WPIX.

THE COURT: He answered your question.

Q Did Mr. Kelner appear in your studio at WPIX at 220 East 42nd Street?

A When, sir?

Q On November 11th.

A No, sir.

Q Did Mr. Kelner ask that you broadcast this

film?

A I don't know, sir.

Q Does Mr. Kelner hold any position with your organization?

A No, he does not.

Q Is he related in any way to the organization?

A No, he is not.

Q Do you know whether Mr. Kelner wanted to have this film to be shown?

A I do not know that.

MR. BUCHWALD: Objection.

THE COURT: Overruled.

Q As far as you know, was there any request made by Mr. Kelner personally as to having anyone of your crew or personnel come to televise this?

A That's a detail I would not know, sir.

Q You do not know that. If I were to tell you that Mr. Kelner had nothing to do with asking personally to be interviewed, would that refresh your recollection?

A No, sir.

Q So you do not know whether Mr. Kelner or any of his associates asked for this particular film?

A That's correct. That's a detail of news

operations.

Q Was there any other TV program, TV station, that came down that evening?

A To my knowledge, no other television station covered the story.

Q Would this be unfair to ask, that WPIX has the tendency to go in for sensational news?

A Yes. That would be an unfair question.

Q Is there a connection between WPIX and the Daily News? Is the a legal connection or corporate connection?

A There is a corporate relationship between the New York News Company and WIPX, Inc.

Q As a matter of fact, isn't the Daily News in the same building?

A Yes.

Q And printed in the same building?

A Yes,sir, to a great extent.

Q Where is your office in relation to that building, the station office?

A Channel 11 office?

Q Yes.

A The 10th floor of the Daily News Building.

Q Isn't it known that the Daily News goes in

for sensational stories? Isn't that a fact?

MR. BUCHWALD: Objection.

THE COURT: Sustained as to form.

Q Is it a fact that in the event that Mr. Kelner were to just give vague, very gentle remarks, would that be newsworthy?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Were you not seeking news that day as we know it in order to show this to the public?

A Our television station seeks to cover the news every day.

Q Mr. Marcovsky, do you know that certain members of your staff, if not yourself, contacted the JDL offices for the month before November 11th asking for information? Are you aware of that?

A Not in specifics.

Q But in general?

A I make the assumption that our news department is trying to cover the news and contacts all kinds of organizations.

Q Well, do you know, specifically, whether the Jewish Defense League called regarding what their opinion was of Mr. Yasir Arafat?

A I do not know that specifically, sir.

Q Do you know generally, sir?

A No, I do not.

Q Now, as far as transmitting -- you used that terminology, did you not, sir?

A Yes, sir.

Q Well, was there anything that Mr. Kelner did personally that you would say that he transmitted, personally actually worked and transmitted?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: Your Honor, respectfully, I would like to finish my statement before there is an objection.

THE COURT: I thought you finished your question. I am sorry.

MR. DECHTER: No, I did not.

THE COURT: Would you read the question back as far as it has gone?

[Question read as above recorded.]

THE COURT: Is there anything you want to add to that question?

MR. DECHTER: No, your Honor.

THE COURT: Objection sustained.

Q Do you know whether there was any prepared statement that he read or gave to your station?

A No, Mr. Dechter, I do not know that.

Q And the only information you have is based upon the film that you looked at this moment before you took the stand? In other words, the tapes that you are talking about and the information regarding that broadcast is based upon this film, sir? Isn't that what we are referring to today?

A The information that I personally have?

Q Well, you are testifying that there was a broadcast. Were you there?

A Yes, sir.

Q I am saying, were you at the spot of the broadcast? In other words, the offices?

A Sir, you are using the term "broadcast." I was at the station when our news show was broadcast that night.

Q Well, I haven't been clear then. I am not talking about the WPIX Studio; I am referring to the fact that this particular broadcast emanated originally, supposedly at an interview, is that true?

A Sir, you are using terms that to me are very

precise --

Q Well, was an interview held at your offices at WPIX?

A No, sir.

Q Do you know who gave out that assignment that particular date to go down to the offices of the Jewish Defense League?

A No, I do not.

Q Well, isn't that your function?

A No, sir.

Q Could you please tell me the name of the person who has that function?

A We have a number of executives in the News Department and we have a number of assignment editors. I do not know specifically who made that assignment. That is a News Department function; that's a detail of the station that I would not be familiar with on a day-to-day basis.

Q Mr. Marcovsky, can you tell me who determines what news broadcasts are put on the air?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Yes, as to form.

MR. DECHTER: I respectfully ask that that question be permitted subject to connection.

THE COURT: Sustained as to form. I appreciate

the connection. Sustained as to form.

Q Do you know, sir, as to who chooses the film that is broadcast?

A Yes, sir. That is a function of several people in our News Department.

Q But you do not know who specifically?

A The film that is chosen for a particular news broadcast is picked by various people in the News Department as part of their normal routine, as part of their jobs.

Q Is that an independent judgment that they make?

A I don't understand the nature of the question.

Q Is it an independent judgment that they make as to which film goes on?

A Yes, within their responsibilities.

Q So that that day on November 11th there could have been thirty news items? Isn't it true that you have an editor who determines what goes on?

A There is a producer; there is a managing editor; there is also a news vice president.

Q You put all thirty on when you have many news items?

A There is obviously a choice made.

Q Therefore, you made that choice, or your agents on their own; you didn't ask Mr. Kelner whether to make that

choice, did you?

A I assume not.

Q Yes or no, sir.

A No, I did not ask him.

Q And you were not directed by Mr. Kelner to do this, were you sir?

MR. BUCHWALD: Asked and answered.

THE COURT: Yes, that has been asked and answered.

Q You say you are an assistant to the president. Who is the president?

A Levitt J. Pope.

Q Mr. Kelner isn't your boss, is he?

A No.

Q He doesn't hold any corporate position?

A No, sir.

Q And he does not in any way have anything to do with submitting the film to you, is that true? Yes or no? Yes or no, sir.

A That is correct, sir.

MR. DECHTER: Thank you, sir.

THE COURT: Any redirect?

MR. BUCHWALD: I have no further questions.

THE COURT: Thank you very much. You may step down.

[Witness excused.]

MR. BUCHWALD: At this time the Government calls Mr. William Goldschlag.

W I L L I A M G O L D S C H L A G , a witness called on behalf of the Government, being first duly sworn, testified as follows:

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BUCHWALD:

Q By whom are you employed, sir?

A I am employed by United Press International.

Q How long have you been so employed?

A Just under three years.

Q And in what capacity, again, are you employed by UPI?

A I am a reporter.

MR. BUCHWALD: Your Honor, if we might have this item marked as Government's Exhibit 2 for identification?

THE COURT: Yes.

[Marked Government's Exhibit 2 for identification.]

MR. BUCHWALD: And if we might have the tag which I have just previously removed from Government's Exhibit 2

marked as Government's Exhibit 2-A for identification?

[Marked Government's Exhibit 2-A for identification.]

MR. DECHTER: May I see them?

MR. BUCHWALD: This was 3505.

BY MR. BUCHWALD:

Q Mr. Goldschlag, let me show you what has previously been marked as Government's Exhibit 2 for identification. Do you know what that item is?

A Yes. This is a copy of an advisory from UPI --

Q May I ask that you keep your voice all the way up so that all the ladies and gentlemen of the jury can hear you and all the counsel at the defense table.

A This is an advisory that moved on the UPI Greater New York Wire on November 11 of last year, and the advisory states --

Q Well, without getting into what it states, would you explain briefly to the ladies and gentlemen of the jury what is an advisory?

A Okay. Well, first of all, the UPI Greater New York Wire is a news service run by UPI which is received by most radio and TV stations and some newspapers in the Metropolitan area; and in addition to providing news we also provide our clients with, you know, information about upcoming

news events which they may want to cover. And when we receive word of such a news event on short notice, an advisory is how we notify the clients that this thing may be coming up.

Q And an advisory is something that goes out over teletype from UPI to UPI's various subscribers?

A Right on the GNY Wire.

Q And the GNY Wire is what?

A Greater New York Wire.

Q And am I correct, sir, that UPI's subscribers include various newspapers, television stations, radio stations?

A Correct.

Q Now, with respect to this particular advisory, Government's Exhibit 2 for identification, were you personally present when that advisory was sent out?

MR. DECHTER: Objection, your Honor, as to time and date.

THE COURT: Overruled.

A Yes.

Q When you say you were there, where were you referring to?

A I was at the, you know, at the local desk of UPI where we control the GNY Wire.

Q Where is your office?

A 220 East 42nd Street.

Q Now, are advisories of this sort, Government's Exhibit 2 for identification, made and maintained by United Press International in the normal course of its business?

A Yes.

Q And is it the business of UPI, among other things, through advisories of this sort to advise its subscribing members of upcoming news events?

A Yes.

Q How does UPI originally get the information that an event is going to occur?

A Well, you know, organizations that, you know --

MR. DECHTER: Objection, your Honor, to statements.

THE COURT: On what ground?

MR. DECHTER: On the ground, first of all, that it's hearsay, and that it's well known. There is no particular purpose in that particular question.

THE COURT: Overruled.

A The question is, how do we receive word?

Q That's right. How does UPI initially receive word that something is going to occur?

A Okay. Well, an individual or an organization that is planning to hold either like a news conference or a

demonstration or some other, you know, possible news event for which they wish coverage, will notify us either by mail or by telephone -- will notify us either by mail or by telephone, and if, you know, if we are confident that the information is accurate we will move it on our wire.

Q What, if any, practice does UPI follow to authenticate that the information is accurate? In other words, what do you do to prevent notifying the news media to show up at such and such a place --

MR. DECHTER: Objection, your Honor, to the question.

THE COURT: No, overruled.

A Well, first of all, we act partially on our own instincts. We know what sounds legitimate and what does not sound legitimate.

Also we ask persons who hold these things to provide a call number or a contact number which should be a listed number where we can doublecheck with the phone book, for instance, or some other source to be certain that this is taking place.

Q Now, are you able to tell from this particular advisory when UPI sent the advisory out to its own subscribers?

A Yes, because all items that are moved on our wire, whether they be stories or advisories, are timed off

by a computer, and this item is timed off at six p.m. on November 11.

MR. DECHTER: It is hard to hear the witness.

Q Let me ask you to keep your voice up again. One of the attorneys at the defense table asks that you raise your voice.

What was that time again, sir? I am sorry.

A Six p.m., November 11.

Q Do you know when in relation to six p.m. on November 11 the information -- that's November 11, 1974, is it not?

A Yes.

Q Do you know when in relation to six p.m. the information that was sent over the advisory was initially obtained by UPI?

A I believe it was within a half hour of when it actually moved on the wire.

Q And I believe you stated that you yourself were personally present?

MR. DECHTER: Objection. The question has been asked and answered.

THE COURT: Is this a foundation to go onto something else?

MR. BUCHWALD: If it has been asked and answered

I am satisfied. I don't recall whether or not I had asked that.

THE COURT: Well, ask it again.

Q Were you personally present, Number 1, when the information was sent out by UPI to its subscribers?

A Yes, sir.

Q Were you present at UPI's offices when the information originally came in to UPI?

A I was either at or around the desk at the time. I was in the offices, yes.

MR. BUCHWALD: Your Honor, at this time the Government offers Government's Exhibit 2 for identification in evidence as Government's Exhibit 2.

MR. DECHTER: Objection, your Honor.

At this particular time I would like to have a conference at the side bar as to exactly in what particular instance this particular exhibit has, what importance.

(At the side bar.)

MR. MANDEL: What does this have to do with this defendant, your Honor?

(Pause.)

THE COURT: Mr. Buchwald, I'll let in the fact that the Jewish Defense League holds news conferences.

MR. DECHTER: If one is left in the whole thing should be left in.

THE COURT: If that's your desire. I would exclude the balance of it.

MR. BUCHWALD: You are referring to the other news items?

THE COURT: To the balance of the item.

MR. MANDEL: What is material with respect to holding a news conference?

THE COURT: The prior witness was directed to who caused this. I think a jury could conclude that --

MR. DECHTER: If you are going to leave that statement in, it should not be a part statment but a full statement.

THE COURT: The entire statement will go in.

(In open court.)

(Government's Exhibit 2 was received in evidence.)

MR. BUCHWALD: At this time, your Honor, if I might display Government's Exhibit 2 to the ladies and gentlemen of the jury and read to them from the relevant portion in the middle --

THE COURT: You may.

(Mr. Buchwald read to the jury from Government's Exhibit 2 in evidence.)

MR. DECHTER: Your Honor, would the United States attorney be good enough to give each juror the opportunity to actually examine that.

THE COURT: I'll let him do it his way. You can ask that afterwards and I will permit it.

MR. DECHTER: Fair enough.

(Mr. Buchwald continued reading to the jury from Government's Exhibit 2 in evidence.)

Q What do the letters PES stand for?

A P is for p.m. and ES is for Eastern Standard Time.

Q Which of these times is the time the advisory is actually sent out over UPI's wires?

news conference to allege threats have been made against Jewish Defense League by Palestine Liberation Organization, 1133 Broadway at 26th Street, Room 1026, 8 p.m.," is that accurate?

A Yes.

Q Did you receive any information from the PLO that they were being threatened other than this?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Did you receive any information at all from the Palestine Liberation Organization or any group in this city?

MR. BUCHWALD: Objection.

THE COURT: On what ground?

MR. BUCHWALD: Relevancy.

THE COURT: Sustained.

MR. DECHTER: Your Honor, respectfully, there is a question here regarding a possible threat. I think it is extrmely relevant and germane to the issues.

THE COURT: Sustained.

Q Were you summoned or contacted by Mr. Kelner?

A I don't personally recall if I am the one

that actually took the telephone call. If I didn't take the call I don't know who actually took the call.

Q Tell me about that day.

THE COURT: I will sustain an objection to the form of that question.

Q Do you recall November 11, 1974?

A Not in its entirety from beginning to end. I would remember parts of it.

Q Do you remember November 10, 1974?

A Not at all.

Q Have you spoken to Mr. Buchwald?

A Yes.

Q Regarding this matter, of course?

A Yes.

Q Have you discussed this case and the testimony that you were going to give?

A Yes.

Q I didn't hear you.

A Yes.

Q The fact that you received an advisory, you have no information where this came from, is that true or not?

A Not at this time, no.

Q I don't hear you.

A I do not at this time have that information.

Q Yes or no. Do you know? Do you know who sewnt it, if anyone sent it?

A I know it was a member --

Q Who would you know?

A Because I do know that the news conference did take place.

Q That's not the question. Please tell me how do you know who called you, if anyone.

A Well, I do not -- if we are dealing in absolutes, no, I can't say absolutely for sure I know who called me.

Q Anyone from the street, in the city, could have called you; that is possible?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Have you ever had the experience where you were told to come somewhere, there was a news broadcast, and you came there and there was no such party? Did that ever happen?

A No.

Q Do you know of any such instance?

A Yes.

Q It is not unusual in your business, is it?

A It is unusual as compared to the times the event does take place.

Q There are times when people call up and say that something is going to happen and you come there and nothing happens?

A That's right.

Q The fact that UPI picked up the story, was that of your own decision?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q You received many communications that day, is that true?

A Yes.

Q Did you put it on the news wires, every one of those statements made that day?

A No.

Q In no way were you directed by Mr. Kelner or any of his associates to put that particular statement there, is that true?

A To the best of my knowledge, we were directed -- not directed but asked by one --

Q You were --

MR. BUCHWALD: May we have the end of the

answer.

THE COURT: Read it back.

(Answer read.)

A -- one of Mr. Kelner's associates.

Q You said before you could not be sure.

A That's why I can't give you the rest of my knowledge.

Q The statement here says that the Palestine Liberation Organization threatened Jewish Defense League. Isn't that why you came down there that day? Isn't that the reason?

A I did not come down to the news conference.

Q Your associates, your agents, anyone working with your organization, did anyone come down because of the fact that the PLO threatened the Jewish Defense League? Isn't that why the conference was scheduled?

A I do not know whether anybody from the UPI actually did cover the news conference. I left the office an hour before the news conference would have taken place to cover another story.

Q Did you find this newsworthy?

MR. BUCHWALD: Objection.

THE COURT: Overruled.

A The advisory itself?

Q The fact that the Palestine Liberation Organization made a threat against the Jewish Defense League.

MR. BUCHWALD: Objection to that as a statement of fact.

MR. DECHTER: No further questions.

REDIRECT EXAMINATION

BY MR. BUCHWALD:

Q Am I correct that the advisory is a means by which UPI advises its subscribers that the JDL has advised UPI there will be a press conference at which the JDL will discuss the fact that it has been threatened by the Palestine Liberation Organization?

A To allege the fact, yes.

Q Is it a statement by UPI it has covered a news event at which threats have occurred?

MR. DECHTER: That's not the fact we are talking about here. That's not accurate. The United States attorney, I'm surprised by that tactic.

THE COURT: I'm not sure whether that is an objection or not.

A No, it is not.

Q Simply an announcement of an upcoming news

conference?

A That's why it is couched in phrases "to allege" rather than to reveal.

Q In your experience as a UPI reporter do you know of situations where you yourself ever had extra-sensory perception --

MR. DECHTER: Objection.

THE COURT: Let him finish. I will sustain your objection, but let him finish.

Q -- ever had extrasensory perception and showed up at a news conference without being told that the news conference was going to be held by the people holding it?

MR. DECHTER: Objection.

THE COURT: Sustained.

MR. BUCHWALD: No further questions.

MR. DECHTER: No further questions.

(Witness excused.)

THE COURT: Let's take our midafternoon recess.

(Recess.)

[In the courtroom in the presence of the jury:]

MR. BUCHWALD: Your Honor, at this time the Government calls Mr. John Miller.

J O H N M I L L E R , called as a witness on behalf of the Government being first duly sworn, testified as follows:

MR. BUCHWALD: Your Honor, may I proceed?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BUCHWALD:

Q Mr. Miller, by whom are you employed?

A Channel 5 News.

Q Is that WNEW?

A That's right.

Q And and I correct that you are also a student?

A Yes.

Q Where do you go to school?

A Montclair High School.

Q In what capacity are you employed by Channel 5 News?

A Night assignment editor.

Q How long have you been so employed?

A A couple of weeks.

Q Prior to that by whom were you employed?

A Channel 11 News.

Q Is that WPIX?

A Yes.

Q How long were you employed by WPIX?

A Eight months.

Q Let me ask you to keep your voice up so that all the ladies and gentlemen can hear you and the people at the defense table.

I take it, then, that you were employed by WPIX last year on November 11, 1974?

A That's right.

Q In what capacity were you employed by WPIX?

A A street reporter.

Q Directing your attention to November 11,1974, did you work at WPIX that day?

A Yes.

Q Do you recall what your first assignment on that day was?

A Yes. It was a demonstration by the JDL at the Waldorf Astoria.

Q Here in Manhattan?

A Yes.

Q And what if anything did you do in connection with

covering the demonstration at the Waldorf Astoria?

A I just managed the film crew and made sure they were in the right places at the right time.

Q When you say you managed the film crew, would you explain to the ladies and gentlemen of the jury how that works?

A Well, I just have to keep an eye on them and make sure they are rolling film when they are supposed to be shooting, you know, recording, and if there is any microphone holding or interviewing to be done, you do that, too.

Q How many people on the film crew?

A Three. Four counting myself.

Q And did you go with the members of the film crew to the Waldorf Astoria?

A No, I came in a cab and met them there, relieving another reporter who went back.

Q But the other three members of the film crew stayed there, is that it?

A That's right.

Q Do you know what the demonstration was about at the Waldorf Astoria?

A They were protesting --

MR. DECHTER: Objection, your Honor.

THE COURT: How is this relevant?

MR. BUCHWALD: Just simply for the continuity of his own activities during the day.

MR. DECHTER: Objection, your Honor. It is irrelevant.

THE COURT: I will sustain the objection.

BY MR. BUCHWALD:

Q Do you recall approximately what time you arrived at the Waldorf?

A I would estimate six o'clock, 6:30.

Q Do you know who, if anyone, was occupying rooms in the Waldorf at this time?

MR. DECHTER: Objection, your Honor; too vague and general.

THE COURT: I would make it more specific.

Q Do you know whether or not the PLO delegation was staying at the Waldorf at that time?

MR. MANDEL: Objection. No foundation to that question.

THE COURT: Overruled.

Either he knows or he doesn't know.

Do you know?

A Yes, I know.

MR. MANDEL: May I have the voir dire, your Honor, then?

THE COURT: Yes, you may.

I assumed we were going to have one counsel.

MR. MANDEL: I am going to take this particular witness.

THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR. MANDEL:

Q Mr. Miller, were you on the registration desk at the Waldorf?

A No.

Q Do you know who was checked into the Waldorf on November 11, 1974?

A From accounts in the newspaper I know some of whom who were checked in.

Q But you don't know anything about who was living there of your own knowledge, do you?

A First-handedly, I guess not.

MR. MANDEL: I renew my objection, your Honor.

THE COURT: Do you want to try to lay a foundation for his knowledge?

BY MR. BUCHWALD:

Q Is there any other basis for your knowledge other than what you read in the newspapers?

A Yes.

Q What is that other basis for your knowledge?

A My assignment editor had advised me that that was the reason I was going there.

Q Is there anything you observed during the JDL demonstration which comprised part of the basis of your knowledge?

A Statements by members of the JDL.

Q I again ask you, was the PLO delegation staying at the Waldorf on November 11, 1974?

MR. MANDEL: Objection, your Honor.

THE COURT: I will permit the question to be answered not on the ground that it was there, but it was his understanding that it was there.

Go ahead.

THE WITNESS: Repeat the question.

Q Was it your understanding that the PLO delegation was staying at the Waldorf during that time?

A It was my understanding.

Q Now, how long approximately, if you can recall, did you stay at the Waldorf or in the vicinity of the Waldorf?

A A half hour, maybe 45 minutes.

Q And what if anything did you do after that?

A We got back in the car and we went back to the station and dropped off the film and received another assignment.

Q And when you say "we", are you referring to yourself and the other members of the camera crew?

A The same crew, right.

Q Do you recall from whom you received your next assignment?

A I think it was -- whichever assignment editor it was.

Q Do you remember offhand who it was?

A Nick Lioacano.

Q Keep your voice up.

A Nick Lioacano.

Q Now, other than verbal instructions did you receive anything else from him?

A He gave me a piece of wire copy.

Q Let me show you what is Government's Exhibit 2 in evidence.

Is this a copy of what you were given when you went back and got another assignment at WPIX' office?

A Yes.

Q Were you also given verbal instructions?

A Yes.

MR. BUCHWALD: If I just might indicate again to the ladies and gentlemen of the Grand Jury that this is the advisory that they previously read.

Did I say Grand Jury?

THE CLERK: Yes.

MR. BUCHWALD: I meant ladies and gentlemen of the jury.

Q Now, what if anything did you do after you received a copy of the advisory?

A We went back to the car. We had instructions to look at something before we went there, which was a demonstration at 100 Centre Street, which is non-existent when we got there, and then we went to the address indicated on the advisory.

Q Again let me ask you to keep your voice up.

THE COURT: Speak a little louder.

Q Had you ever been to the JDL offices prior to that?

A No.

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

Q Now, do you recall offhand the address that you arrived at?

A No.

Q Do you know approximately where it was?

A It was something to the effect of 1121 or 1133 Broadway. It was around 21st Street, Lower Broadway.

Q And did you go again with the members of your camera crew?

A Yes.

Q Do you remember who they were, incidentally, who the other three people were?

A Yes.

Q And who were they?

A By name?

Q Yes.

A Chris Moriello was the camera man; the sound man was Sal Orisso; the light man was Jimmie Mansueli.

Q These are all WPIX employees?

A Yes.

Q After you first entered the building -- by the way, what kind of a building is it, 1133 Broadway?

A It is an office building.

Q After you first entered the building, where did you go?

A I think it was the seventh floor.

Q You took an elevator up?

A Yes.

Q What happened when you got out of the elevator?

A We were directed to a room.

Q And when you say you were directed, what if

anything did you first observe as you stepped out of the elevator?

A There was a uniform guard type, I guess; people in Army fatigues.

Q How many such people did you observe at first when you got out of the elevator?

A Two or three.

Q When you say you were directed somewhere, would you elaborate on that?

A Well, we asked where the press conference was, and they pointed us in the direction, saying around the corner to a door, where there was another guide in front of the door, and he knocked for us.

Q Then what happened?

A Somebody opened the door and we went into a small room.

Q When you got into this small room did you see anybody else in the room?

A Other reports, photographers.

Q Did you recognize any of them personally?

A A few.

Q Did you know some of the news organizations that they were with?

A Yes.

Q Would you let the ladies and gentlemen of the jury know.

A WNEW Radio; WINS Radio; The Daily News, and I think NBC Radio.

Q Was anyone else other than these other representatives of the media present in this small room?

A Well, I don't know -- you know, there were a number of people there, and the ones I recognize were the reporters. Who I recognized I couldn't say.

Q What if anything happened after you arrived in the small room -- do you recall approximately what time this was, incidentally?

A Eightish.

Q At night?

A Yes.

Q What if anything happened after you entered the small room that you had been directed to?

A The door was opened leading to another room, and the reporters and radio people and photographers went in. We were the last people in. And, you know, they started questioning and answering and all that stuff, taking pictures.

Q When you went into this larger room from the smaller room, did you see anyone else other than reporters?

A Yes. There was a man at the desk, and another

one of these guys in Army fatigues, or something, standing off to the right.

Q Do you know the name of the man you saw at the desk?

A Yes.

Q Who was that man?

A Russel Kelman.

Q Do you see that man present in the courtroom today?

A Yes.

Q Would you point to him, please?

A [Witness indicates.]

Q Would you describe what he is wearing?

A The man in the checked sport jacket and brown shirt.

MR. BUCHWALD: May the record reflect, your Honor, the identification of Mr. Kelner?

THE COURT: It may.

MR. BUCHWALD: May we have this item marked as Government's Exhibit 3 for identification.

[Marked Government's Exhibit 3 for identification.]

Q Let me show you Government's Exhibit 3 for identification and ask you what it is.

A That was the room.

Q Let me ask you to keep your voice up so that everybody can hear you back there.

Does this photograph accurately portray the scene of the room that you observed when you entered the large room that you just described in your testimony?

A Yes, it does.

MR. BUCHWALD: Your Honor, at this time the Government offers Government Exhibit 3 for identification as Government's Exhibit 3.

MR. MANDEL: May we approach the side bar?

THE COURT: Yes.

[At the side bar:]

MR. MANDEL: I don't think this is admissible. It does not have any probative value of the charges made.

What's more, I think from the context it is one of many pictures, and this is a particularly inflammatory one. If it was not published -- and there is no evidence that it was -- I see no reason for it going in. The witness described it.

THE COURT: Well, from what I heard in the opening statement, there is going to be proof here that this gun and this man standing behind what apparently is the defendant were present throughout the making of the statements that

the Government contends constituted the threat in this case.

MR. BUCHWALD: That is correct, your Honor.

THE COURT: And therefore they are part of the background framework against which the true import of these words are to be measured.

I therefore overrule the objection.

MR. MANDEL: Your Honor, I just address it to the question of the inflammatory nature of it. It doesn't prove anything more than the witness' statement. You have a film which is the charge. This is not the charge. It certainly is secondary. It is quite remote.

THE COURT: This is a photograph of the situation was at the time that the threat was made, the Government contends.

MR. MANDEL: Your Honor, I respectfully, very respectfully say that this should not be let in. It is inflammatory.

THE COURT: Is there going to be any contention that the film that is going to be shown does not contain a photograph of these men at the time the statement was made?

MR. MANDEL: Whatever it will show, it will show. I have never seen the total film.

THE COURT: Mr. Dechter, have you seen the film?

MR. DECHTER: No.

THE COURT: YOu have not seen the film, either of you?

MR. MANDEL: I saw it once when it was broadcast, and that is the only time I have seen it.

MR. DECHTER: I have never seen it.

MR. MANDEL: The film is the charge. This has a lot of other extraneous material.

THE COURT: Do you know when this was taken?

MR. MANDEL: I am sure it was taken on or about the occasion. I have no doubt it was taken that evening. That is what the witness said, and I have no reason to doubt it. It is the inflammatory nature of it that I object to.

MR. DECHTER: The film would show everything. It would be redundant.

THE COURT: I will overruled the objection.

[Government's Exhibit 3 for identification received in evidence.]

(In open court.)

MR. BUCHWALD: MayI display Government's Exhibit 3 to the jury, your Honor?

THE COURT: Yes.

(Government's Exhibit 3 in evidence handed to the jury.)

(Pause.)

BY MR. BUCHWALD:

Q When you first entered the room, what, if anything, was going on, the big room depicted in that photograph?

A Just the reporters questioning, and answering, and writing and recording.

Q Keep your voice up.

When Mr. Kelner was making a statement other than in response to reporters' questions --

MR. DECHTER: I object. This is leading.

THE COURT: Sustained.

Q As best as you can recall, tell the ladies and gentlemen of the jury what you heard and who said what at the end of the large room depicted in that photograph.

A When I walked in, as I recall it, the other

reporters started their work, he was already speaking on something.

Q Who was already speaking?

A Mr. Kelner.

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A Somewhere in the middle of that he was interrupted by questions.

Q Do you recall what Mr. Kelner said?

A I was not paying too much attention because it had started without us and we were obviously going to have to do it after the other people were finished, so my cameraman was filming pictures of the other reporters talking to him. I was busy making sure everything was going all right with my own crew.

The thing that caught my attention was them interrupting him, asking questions, and that was the first I heard of this death plot thing.

Q When you say that's the first you heard of the death plot, did you hear that terminology or those words?

A One of the reporters said, "Are you talking about an assassination plot?" and so on like that, and he responded affirmatively.

Q Who are you referring to when you say he responded affirmatively?

A Mr. Kelman.

Q Did there come a time when you yourself commenced an interview with Mr. Kelman?

A Yes.

Q When was that in relation to the time you first entered the room?

A Fifteen minutes after it started, supposedly.

Q Prior to the time that you commenced your interview had the word "assassination" been used?

MR. DECHTER: Objection, your Honor.

THE COURT: As to form, sustained.

Q When you conducted your interview, what, if anything, were the members of your film crew doing?

A While I conducted my interview they were filming. They were filming it.

Q What kind of camera did they have, the size of the camera?

A It's an Auricon. It was about that big.

Q How far was the camera from Mr. Kelner?

A Six feet.

Q Was there any lighting that was necessary for filming?

A Yes.

Q What kind of lighting?

A It's a Frezzy light. It can be handled or set up on two stands.

Q It's a very bright light?

A Yes.

Q Did you have a microphone?

A Yes.

Q Did the microphone have WPIX on it?

A It has an "11" on it.

Q For Channel 11?

A Yes.

Q Where did you hold the microphone?

A In my hand.

Q How far were you from Mr. Kelner?

A Two or three feet.

Q How far was the camera from Mr. Kelner?

A About six feet.

Q When he was speaking was he facing the camera?

A Yes.

Q Could you see the camera from where you were?

A It was behind me. I was facing Mr. Kelman.

Q What, if anything, did you do when you con-

cluded your interview?

A While the film crew was getting everything together I got the spelling of Mr. Kelner's name and took the film to the lab.

Q What, if anything, did you do after that?

A Went to a shooting in Queens or a homicide.

Q That's totally unrelated to the JDL in this case?

A That's right.

Q That was another news story you had gotten?

A Yes.

Q What, if anything, did you do with the film of your interview with Mr. Kelner?

A We took it with us to the shooting and when we got there we gave it to a cab driver who was sent by radio from the station.

Q Sent by WPIX to pick up the film?

A Yes, and bring it back.

Q Later that night did you yourself return to WPIX?

A Yes.

Q And those offices are where?

A 220 East 42nd Street.

Q What, if anything, did you do when you re-

turned to WPIX?

A I was waiting -- I typed up a quick fact sheet on the murder in Queens, and when the film of the JDL press conference came up I went and edited it.

Q What does the editing process consist of?

A The film editor puts it up on a viewer and the correspondent stands behind him and they roll it through ahd he says when to stop it or when to cut anything out, or whatever has to be done to make it short enough.

Q Thereafter, was the film telecast on WPIX that night?

A Yes.

Q Were you present when it was telecast?

A Yes.

Q Did you see it actually being telecast?

A Yes.

Q Did the film which you saw telecast -- was it an accurate portrayal of Mr. Kelner as you had observed him at the JDL offices earlier that evening?

MR. DECHTER: Objection.

THE COURT: Overruled.

A I would say so.

MR. BUCHWALD: At this time, your Honor, the government offers Government's Exhibit 1 for identification in evidence as Government's Exhibit 1.

THE COURT: It may be received.

(Government's Exhibit 1 was received in evidence.)

BY MR. BUCHWALD:

Q Mr. Miller, where do you live?

A Montclair, New Jersey.

Q Have you ever seen from your home the 10 O'clock WPIX News on television?

A Yes.

Q On what channel is that in Montclair, New Jersey?

A 11.

(TV tape run for jury.)

MR. BUCHWALD: I believe we started in the beginning, your Honor.

MR. MANDEL: I object. I don't want to go over that again.

THE COURT: Counsel come up to the side bar.

(At the side bar.)

THE COURT: Didn't a piece of that break

off? He started with a broken piece.

MR. MANDEL: There was a leader.

THE COURT: The thing broke somewhere. Check that out. I think that the film broke in the middle and he started in the middle. We may have to repair it and run the whole thing tomorrow.

MR. DECHTER: If you show the other one tomorrow, could you stop at that point, where we just started today? Otherwise we would be showing it twice.

MR. MANDEL: I have a problem. My problem, I would like to get back to earning a living tomorrow. I would like to take Mr. Miller's cross questioning tonight. If you are going to run the film, run it some other time, but let me get at him.

MR BUCHWALD: He has advised me there was in fact a portion of the beginning which broke off. He says he can either splice it and put it back together, otherwise we have the duplicate that was made by WPIX which we can play on another projector which we have which has the whole thing.

THE COURT: How long will that take?

MR. BUCHWALD: Five or ten minutes to set

up.

THE COURT: How long would your cross examination be?

MR. MANDEL: I hope to finish in 25 minutes. I don't want to leave them with the film in their mind without the cross examination. I would most respectfully ask if you are going to run the film, to run it some other time.

THE COURT: I will run it complete at this point. We are going to stop at 5 o'clock.

If you have questions left over you will have to come back.

MR. MANDEL: You put me at such a disadvantage for his sloppiness.

THE COURT: We are trying a case here. If you are counsel, you have to arrange yourself to be with the case. If you can't be with the case, that's a problem personal to you.

You want to run the other machine?

MR. BUCHWALD: Yes.

(In open court.)

MR. BUCHWALD: Your Honor, if I might, at this time I will state to the ladies and gentlemen of the jury the nature of our stipulation.

THE COURT: Very good.

MR. BUCHWALD: We have the reel of film, which I am presently holding, that is to be deemed as Govenrment's Exhibit 1A.

Ladies and gentlemen, Mr. Dechter and I have stipulated that Government's Exhibit 1A is an exact copy of the film Government's Exhibit 1 which WPIX caused to be made. Government's Exhibit 1A can be played on a different kind of projector than the original film which we have here. To facilitate matters this will be played in its entirety this afternoon. This is stipulated to be an exact copy.

MR. DECHTER: That's correct.

MR. BUCHWALD: We hope to have better luck.

THE COURT: The record should show the projectionist advised us that the film he was working with parted in the middle. It was a question of undertaking to splice that or using the one he has in his hand.

(Government's Exhibit 1A in evidence was run for the jury; the sound track did not work.)

THE COURT: Turn it off, please, until the sound is there.

MR. DECHTER: May we have a side bar on this?

(At the side bar.)

THE COURT: For the record, we ran about 15 or 20 seconds without sound.

MR. DECHTER: But it showed. Let the record show that there were certain pictures shown, and if this continues -- this happened two or three times -- it 's no one's fault, I am sure --

THE COURT: It has not happened two or three times.

MR. DECHTER: It happened twice.

THE COURT: No. We put the film on one time on this new machine.

MR. DECHTER: The first time was the other film.

THE COURT: The first time we ran the second half of tne other film.

MR. DECHTER: If there is a third time it would become a question of being inflammatory.

THE COURT: The objection is overruled.

MR. DECHTER: I would like to finish the objection.

THE COURT: No, I don't want to hear it.

MR. DECHTER: It is prejudicial.

THE COURT: It is not prejudicial.

All right, we are going to recess until 10:30 in the morning, at which time I trust we will have cured all of our various technical problems.

(In open court.)

THE COURT: Ladies and gentlemen, we will stand in recess until 10:30 tomorrow morning. At that time I trust we will have cured our technical problems.

Meanwhile do not discuss the case with each other or anyone else.

Don't read anything about this in the paper or watch it on the television. In other words, do not pay any attention to anything you see or hear about this in any media of any kind. If you see any indication of it on television, turn it off.

Good night.

(Adjourned to June 12, 1975, at 10:30 a.m.)

UNITED STATES OF AMERICA

vs.

RUSSELL KELNER

New York, June 12, 1975,

11:20 a.m.

Trial resumed.

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(In open court; jury present.)

MR. BUCHWALD: Your Honor, I believe -- why don't we bring Mr. Miller back out -- I believe that our technical difficulties have been cured since yesterday afternoon, at least I am hopeful of that, and when Mr. Miller resumes his seat, I think we might play the film.

J O H N M I L L E R resumed.

THE CLERK: Mr. Miller, you remain sworn.

THE COURT: Get the lights.

(Film played.)

DIRECT EXAMINATION CONTINUED

BY MR. BUCHWALD:

Q Mr. Miller, seeing the film, right in the beginning of the film, after the shot of the desk and

the people and the camera zooms in on Mr. Kelner, why is there no sound, if you know?

A You mean before the actual speaking part?

Q That is correct.

A It's called setup. They use it -- they wipe the sound on the film and just use general shots of like the press conference scene so the anchor man can lead into it by saying there was a press conference tonight and so-and-so and here is what they said.

Q You mean during the actual transmission on television, WPIX, the anchor man is saying something about there was a press conference at the JDL and had superimposed the background?

A Right.

Q From the time that Mr. Kelner first says anything on the film until the time that the film ends, was that all continuous or was there any editing during that portion?

A There was no editing. No editing up until the part where the sound dumps out.

Q At the end?

A Right.

Q After the last statement that Kelner makes during the period of the press conference depicted on

the film, did you continue to interview Kelner?

A Yes.

Q Or did the interview end right there?

A We continued the interview.

Q I take it that it is that portion, what follows, that was edited out?

A That is right.

Q Now, in that end portion of your interview of Kelner, which does not appear on the film, but eventually was shown on WPIX, did he retract or modify anything that he had said on the part that was shown?

MR. MANDEL: I object, your Honor.

THE COURT: I will sustain it as to form.

Q What else did he say?

A Well, the questioning continued --

MR. MANDEL: I will object again, your Honor.

THE COURT: I take it this is relevant to the government's allegations?

MR. BUCHWALD: Yes, your Honor, and to rebut what I felt was the beginning of the defense argument that this was something done by WPIX to make it look bigger than it was.

THE COURT: Let's have a side bar.

(At the side bar.)

THE COURT: What do you expect him to say?

MR. BUCHWALTER: That he didn't modify or retract anything.

MR. MANDEL: It is proper rebuttal, your Honor, not now.

THE COURT: You mean redirect.

MR. MANDEL: Redirect.

THE COURT: Yes, I will sustain the objection.

(In open court.)

BY MR. BUCHWALD:

Q Now, Mr. Kelner's first words on the film, "We have people who are trained and are out now and intend to make sure that Arafat and his lieutenants do not leave this country alive," and no questions of yours preceded that statement on the film --

MR. MANDEL: Your Honor, I object.

I am sorry.

Q -- do you recall whether or not, prior to Kelner's statement on the film which I have just read you had asked him a specific question?

A No, I instructed him to, you know, start. There was no formal questioning. I just said, "Go

ahead."

Q He said on the film something --

MR. MANDEL: I object to counsel's resuming the testimony that we have all seen.

THE COURT: Let's hear what the question is.

Q Mr. Kelner says on the film something about having people who have been trained. Did he, prior to your interview of him, which is depicted on the film, while you were in that bigger room and you saw Kelner and the other newsmen, had he spoken at all about people who had been trained?

MR. MANDEL: I object, your Honor, as to form.

THE COURT: Overruled.

A I don't know because I wasn't paying too strict attention to what he was saying to the other reporters at that point. I caught bits and pieces.

Q Did you overhear anything?

A I overheard some of it.

Q What, if anything, did you overhear pertaining to that subject?

A Training?

Q That is correct.

A I don't recall what I overheard. I directed a question --

THE COURT: You have answered, sir.

Q Let me show you, if I may, Government's Exhibit 3502 for identification, specifically page 2 thereof and I ask you if that refreshes your recollection at all. Does that help you at all?

A Only in what he said to me. Not what he said to the other reporters.

Q What, if anything else, did he say to you about training which is not depicted on the film?

MR. MANDEL: Your Honor, I object to this.

THE COURT: Overruled.

A I asked him to elaborate --

THE COURT: This is after?

THE WITNESS: After what you have seen.

THE COURT: After the portion --

THE WITNESS: The portion that is not on this film.

THE COURT: After the portion that we have seen?

THE WITNESS: Right.

THE COURT: Go ahead.

A I asked him where the people had been trained and how and so on and he said they had been trained in the Catskills at a special camp.

Q Did he say whose camp it was or who ran the camp?

MR. MANDEL: Object, your Honor.

THE COURT: Overruled.

MR. MANDEL: It is leading.

THE COURT: Overruled.

A A JDL camp.

eorf 3 Miller-direct

Q I would like to direct your attention again, if I might, to the period of time from when you first entered that larger room where Mr. Kelner was until you actually commenced your interview of Mr. Kelner. Do you have a present recollection of everything that Mr. Kelner said on November 11th prior to your own interview of him?

A Not everything because I was busy, but a couple of things.

Q Would you relate to the ladies and gentlemen of the jury that which you do recall?

A While the cameraman was setting up and doing those silent shots that begin the sequence, the other reporters were interviewing him, the radio reporters in particular, and they cut him off at one point and said, what do you mean by get,and that was the first time I heard anything about this assassination plot.

Q Who said, "What do you mean by get"?

A One of the radio reporters.

Q What, if anything, did Mr. Kelner say in response?

A He began to speak as he spoke to me about, you know, the assassination plot in relation to Mr. Arafat.

Q Is it as a result of having heard that conversation that you were able to say when you began your interview, would you please start from the top?

eorf 4 Miller-direct

MR. MANDEL: I object, your Honor.

THE COURT: Sustained.

Q Now, you stated yesterday, I believe, that after you left the JDL office following the interview you covered another story, a separate story in Queens, and you returned to the WPIX studios on 42nd Street?

A That's right.

Q While you were in Queens you sent the messenger back to the studio?

A That's right.

Q When you returned to WPIX studio, had the film at that point been edited?

A No.

Q Had the film at that point been developed?

A If not upon my arrival, shortly thereafter.

Q Were you physically present at WPIX -- withdrawn.

Where physically at WPIX is the film edited? Where does that take place?

A Well, it is down the hall about 50 to 75 feet from the newsroom.

Q Who is the film editor at WPIX, if you know?

A There are several.

Q Is Mr. Paul Bloom on the editing staff?

A No, he is a reporter.

Q A reporter. Were you physically present when the film was edited?

A Yes.

Q In the editing process itself, were any of Mr. Kelner's statements switched around?

A No, that is a straight cut.

Q What was seen there was continuous from beginning to end?

THE COURT: Did you answer?

THE WITNESS: Yes.

Q Was anything taken out of context?

MR. MANDEL: Your Honor, we have been through this already.

THE COURT: Overruled.

A No.

Q Incidentally, I think that this is crystal clear, the person asking those questions on the film that we saw here is yourself, is it not?

A That's right.

Q Was there any -- from the time you entered the large office where the press conference actually took place until the time you left, was there any time when the gun that was on the desk was removed from where it was on the picture?

MR. MANDEL: Your Honor, I object to it. There is no relevance to that question and it certainly doesn't belong here.

THE COURT: Overruled. You may answer.

A It was handled by a couple of the reporters.

Q Did you hear any -- were there any questions to Mr. Kelner about the gun and did Mr. Kelner make any statements about the gun?

MR. MANDEL: I object, your Honor.

THE COURT: Overruled.

A There were questions as to the type of gun and if it was loaded.

Q What were the responses. First, who responded?

A I don't recall the responses.

Q Do you recall who it was who was responding?

A It was Mr. Kelner.

Q Was there anyone else who was speaking to the press from the JDL in that big room, in the press conference room?

A Not that I noticed.

Q Now, you referred, I believe, yesterday when you got off the elevator on the 10th floor of the office building there that you were directed to the little room by two men in uniform, I think were your words. Were these police officers or were these men wearing the kinds of uniforms as were depicted on the film?

MR. MANDEL: Your Honor, I object to this testimony. He has testified to this. The film has been seen. I see no further purpose in going into it.

THE COURT: The objection is overruled.

A What was the question again?

Q The uniform -- who were the uniformed men as best as you could ascertain from your observations at the time?

THE COURT: Let's get your earlier question read back.

May we have the question read?

(Question read.)

A They were wearing green army fatigues.

Q Were they the same men as the two men standing at Mr. Kelner's side in the film?

A Well, there were four or five of them. The ones who directed us to the little room were not --

Q Were not the same fellows?

A That's right.

MR. BUCHWALD: No further questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Miller, you have testified, haven't you, that on November 11, 1974 it was in your mind that Yasir Arafat, the PLO delegation, were staying at the Waldorf-Astoria Hotel, is that correct?

A That is correct.

Q The Waldorf-Astoria to your own direct knowledge is in Manhattan, Park Avenue at 50th Street?

A That is correct.

Q Now, did it also cross your mind at that time that many Jews, Mr. Kelner among them, had very serious

strained feeling resulting from their own memory of previous disasters to the Jewish people. Were you aware of that?

A Yes.

Q You were aware, of course, that Arafat's presence in New York had caused great strain and shock to many people and particularly Jews who were fearful of the safety of Israel. Isn't that true? Wasn't that on your mind?

MR. BUCHWALD: Objection.

THE COURT: Sustained as to form.

Q Were you aware when you set out that day to cover these events that Mr. Kelner, among other concerned Jews, would be under stress and strain because of the visit of Arafat? Were you so aware?

MR. BUCHWALD: Objection.

THE COURT: I will permit it.

A Not Mr. Kelner specifically.

THE COURT: That is the extent of the question. Were you aware of that as to Mr. Kelner?

THE WITNESS: No.

Q You were aware that Mr. Kelner was Jewish?

A I was not aware of Mr. Kelner at all.

Q You had seen him before, hadn't you?

A Not to my knowledge.

Q You had seen the JDL?

A Many times.

Q When you went out to interview Mr. Kelner, you knew he was a member of the JDL or associated with it and you believed or it was in your mind that it was Jewish, wasn't it?

A Mr. Who? I didn't hear the question.

MR. MANDEL: Would you repeat it, Mr. Reporter.

(Question read.)

Q He was Jewish?

A Yes.

Q You knew that Jews, concerned Jews, that he was a concerned Jew, concerned about the fate of other Jews, isn't that true?

MR. BUCHWALD: Objection.

THE COURT: I will permit it.

A I didn't know anything for sure before that.

Q But you had, you know, you had the same sort of belief about Arafat's presence in the Waldorf,you had no doubt about that, though you didn't know it of your own knowledge, did you?

THE COURT: Objection sustained.

MR. MANDEL: Your Honor, I didn't hear an objection.

THE COURT: Go ahead.

Q This was the background under which you went out

on your assignments during the day, wasn't that so?

A Which background are you referring to?

Q The background of concern, the background of stress and strain over the visit of Arafat, wasn't that what made it newsworthy, what you went out for?

MR. BUCHWALD: Objection.

THE COURT: Yes.

Gentlemen, come to the side bar, please.

(At the side bar.)

THE COURT: How far are you going to go?

MR. MANDEL: Your Honor, I intend to bring this to the point of showing the state of mind of Mr. Kelner and to bear on the question of criminal intent. I intend not to explore it, I don't intend to make this a political trial, but I think that this was the murmur in the streets, the background of the event that he went out to cover and I think it is proper.

THE COURT: I am then permitting you some latitude as to the defendant's state of mind. I don't want to get into what -- anything beyond that. I have a feeling that at times the line tends to get blurred in your questions.

MR. MANDEL: Your Honor, I will use extreme caution. I intend only to cover what I think is relevant.

I have worked out these matters in detail and if I may be permitted I will not abuse the privilege.

THE COURT: Mr. Buchwald.

MR. BUCHWALD: Your Honor, I can see no way other than through what Mr. Miller observed and heard that any of this testimony can be relevant as to Kelner's state of mind. It has to be what he saw and observed. Not what he thought.

THE COURT: That is what troubled me about this.

MR. MANDEL: Yesterday you permitted him to testify to his state of mind. Yes, your Honor, that was the basis on which the testimony about Arafat came in. I will permit him, you said, to testify to his state of mind.

THE COURT: But you didn't object to it.

MR. MANDEL: Your Honor, I had objected --

THE COURT: You had objected to whether he knew Arafat was in the Waldorf and I sustained an objection to that.

MR. MANDEL: Exactly.

THE COURT: Then when the question was amended I think I said I would permit the --

MR. MANDEL: As showing his state of mind. I agree with you.

THE COURT: It was his state of mind --

MR. MANDEL: I don't object to it. That is precisely what I want now.

THE COURT: That doesn't necessarily open the door to his state of mind about the great wide world.

MR. MANDEL: I didn't ask him to cover the entire world. I intend to focus on the issues of the day and to focus particularly on the question of criminal intent and this does bear and he observed marches, he observed a lot of things. I will get into that in proper detail. I am not trying to stray afield.

THE COURT: I will permit you to get into what he personally observed and as to his state of mind about what people in general were concerned about. I don't think that is relevant.

MR. BUCHWALD: If it is helpful to have a stipulation that many peopel opposed Arafat's visit and it was a question on which many people vocally disagreed, we will stipulate to that.

MR. MANDEL: I will have to refuse the stipulation. I want the testimony. It is a little different.

THE COURT: I will take ach question as they come, but I think I made my guidelines somewhat evident.

MR. MANDEL: I appreciate it, your Honor.

(In open court.)

BY MR. MANDEL:

Q Mr. Miller, on the afternoon of November 11, 1974 you had observed a great crowd of people outside the Waldorf demonstrating, hadn't you?

A Yes.

Q They were carrying placards, weren't they?

A Yes.

Q They seemed agitated and concerned?

A Yes.

Q And what did you observe was the focus of their concern? Was it Yasir Arafat's presence in the city?

A Yes, it was.

Q Did you observe them objecting to what in their terms was a murderer striding the streets of New York in peace?

A Yes.

Q Did they carry placards that you observed relating to Ma' alot and Kiryat Shemona and other atrosities such as the Munich massacre and ascribe them to Arafat, did you observe that?

A Yes, I did.

Q They were agitated, weren't they?

A Yes.

Q You have testified, haven't you, that you picked

up your assignment from a Nick, and I am not sure I have the spelling, Nick Lioacano, is that right?

A Yes.

Q And he didn't give you any special instructions, did he, when he sent you out. He said go cover this, right?

A That's right.

Q He was your assignment editor?

A That's right.

Q Mr. Kelner isn't your assignment editor, is he?

A No, he is not.

Q There are many assignment editors at WPIX, aren't there?

A No.

Q How many are there?

A Two.

Q There are two. Mr. Kelner isn't among them?

A No.

Q Mr. Kelner doesn't work for WPIX as far as you know, does he?

A Not as far as I know.

Q You don't work for the JDL, do you?

THE COURT: Sir, I don't see any point in asking these self-evident questions and we have had three or four of them in a row.

MR. MANDEL: Very well, your Honor.

Q WPIX is totally independent of the JDL --

THE COURT: Sustained.

Q Did you get any special instructions from Nick Lioacano when you went out, any special details of how to cover this event?

A Nothing out of the ordinary, nothing special.

Q He gave you the slip of paper, which was the UPI advisory, and said, Go out and cover that, didn't he say something like that?

A Something like that.

Q What did you do, get in a cab and go there?

A I was with the crew. They were in the building. We went there together.

Q The crew consists of a light man, a camera man, a sound man and yourself?

A That is right.

Q And you have an Oricon camera, which is a magnetic tape camera?

A Yes.

Q It is not a broadcasting too, it is a camera that records in its own base, isn't that so?

A That is correct.

Q The film is there. The development is the

development of the magnetic tape, is that right?

A Not really.

Q Tell me what is right, please?

A The magnetic tape runs through the camera. It is called a mag stripe. It is just a magnetic stripe along the side of the film. The film is developed.

Q The film is optical and the sound track is magnetic, is that what you are saying?

A That's right.

Q So you developed the film optically in the usual processes and you have the sound track on magnetic tape as if it were an ordinary tape recorder that we are all familiar with?

A Right.

Q That's it, it is self-contained and doesn't broadcast anything, that camera of yours?

A No.

Q When you went from your office in the News Building at 220 East 42nd Street, you went down to 23rd Street and Sixth Avenue, you were still on the Island of Manhattan, of course, right?

A That's right.

Q When you came into the room, there was a great hubbub in the room, wasn't there?

A Yes.

Q How many people would you say were in the room and what was the size of the room? About half the size of this room?

A Oh, no.

Q A quarter of the size?

A At the most I guess 10 feet in either direction. It was a fairly small room and there was about seven or eight people in it.

Q How many minutes of film does your camera carry? How long can you roll on one take?

A Maybe five minutes.

Q You have extra cans of film with you?

A Yes.

Q How many minutes of film did you shoot that night at 1133 Sixth Avenue at the offices of the JDL?

A Maybe two minutes, two and a half.

Q Do you know the time of the film that was shown here?

A Not exactly.

Q If I tell you that I make it to be 53 seconds, would you assume that is about correct?

A Probably.

Q That film wasn't an exact duplicate of what

went out over the air on WPIX that night,was it?

A Yes, it was as far as I know.

Q There was something missing, wasn't there? Your voice-over in the beginning, the intro?

A It wasn't mine. It was done live so there wouldn't be much of a tape on it. It wasn't part of the film. It was done by the anchorman.

Q There was sound that, the film started silently and there was sound and we haven't get that sound here.

A Right.

Q To that extent the film differs from what was shown?

A That's right.

Q Of the two and a half minutes, only 53 seconds showed up on the screen, assuming my stopwatch is correct?

A Yes.

Q Other people were shooting cameras at the time, weren't they? Other wire services.

A The still photographers, yes.

Q There were still photographers there?

A That's right.

Q Were there any other film cameras such as yours, videotape film?

A No.

Q Were there any radio tapes being made?

A Yes.

Q Who was making those?

A Radio reporters.

Q I'm sorry. Would you know who they were?

A Six months ago or whatever it is, I don't really recall.

Q I'm sorry, I didn't hear the answer.

A I don't recall. It has been quite a while.

Q What radio stations were present there?

A WNEW radio, WINS and I believe NBC.

Q What time to the best of your recollection did you arrive in that room?

A Close to 8:00 o'clock.

Q But the conference had already started, wasn't that so? It was proceeding?

A No, we got there -- we got into the room the same time as everybody else.

Q Didn't you testify -- it is my recollection that you testified before the grand jury that the conference had been going on before. Perhaps we could look at those minutes and see whether my memory is correct.

A It had started without us.

Q It had started prior to your coming there?

A No, we were there. They began before we were ready to film it so we waited.

Q So that other cameras were working, not other cameras, but other tape machines were working.

Now, your recollection of the conversation between or statements made by Mr. Kelner and the other reporters prior to your entry with the film is kind of vague, if I am summarizing it correctly. You remember some things that you overheard.

A That's right.

Q Some things you have forgotten or you didn't hear clearly in the first place?

A That's right.

Q You didn't receive any press release, any text of a statement from Mr. Kelner?

A Not to my knowledge, no.

Q There was none there, was there?

A I didn't see any.

Q Was there -- you didn't see any prepared statement written out, typed out or duplicated and set up that he read from, did you?

A At some point I believe he was reading from papers or had papers -- had a paper in front of him, but I don't know what was on it. I couldn't say if he was

reading from it.

Q Is it a fair summary to say that the remarks he was making were off the cuff, extemporaneous in response, isn't that so?

A The remarks he made to me.

Q The remarks that you observed him making to others, weren't they of the same nature?

A I wasn't paying too close attention to what they were doing because we were making a silent film.

Q I'm sorry?

A We were making the silent film. I was making sure everything was going correctly. I wasn't paying too much attention to what the other reporters were doing.

Q So you really don't know the contents of what preceded this, you don't know?

A I got the basic idea at the time.

Q Now, the basic idea was that summarized in the advisory from the UPI that you had? The UPI summary, you remember that, the advisory?

A Yes, I remember it.

Q The advisory said in substance, the JDL has been threatened by the PLO and wants to have a news conference about it, isn't that what it said?

A That is what it said.

Q Wasn't that the gist of what was going on prior to your actual participation in the proceedings?

A I never heard anything about those threats throughout the time I was there, it was never mentioned to me.

Q It could have been mentioned outside your hearing because you were very busy, but that was the subject of the conference as called, wasn't it?

A As called.

MR. BUCHWALD: Objection.

THE COURT: Sustained as to form. Any answer is stricken.

Ladies and gentlemen, from time to time you may have heard me strike out an answer. I know we are all human, and things are heard even if they are stricken from the record. The purpose of striking something out is that as far as humanly possible it is not to be considered by you as ever having been said. You are not to deal with it in any way, give it no weight or give it any consideration at all in your function as jurors. Put it out of your mind when something is stricken.

Q Mr. Miller, you had some months of experience as a reporter prior to November 11, 1974?

A Yes.

Q And your job as a reporter is to get news, isn't that right?

A That's right.

Q You want lively news, isn't that correct?

A No.

Q Do you want dull news?

A Just news.

Q There is a difference between -- you recognize that there is a difference between lively news and dull news, and in general you would rather have something lively than something dull, wouldn't you; that's fair enough?

A I don't categorize news as lively or dull. I cover what they tell me to cover. It doesn't make any difference to me.

Q It doesn't make any difference to you what you get when you go out?

A Well, coming back with a good story is a lot better than coming back --

Q Precisely. You were out to come back with a good story because you are a good reporter, isn't that so?

A I was out to come back with what happened. If a good story unfolded, I would come back with it. If it did not, I wouldn't.

Q You weren't going to make it up, obviously?

A Certainly not.

Q That is true. But you were pleased with this story when you got it, weren't you, it was a lively story?

A Yes.

Q As a matter of fact, weren't you the only one who got this story out of all the reporters who were present?

A No, I was the only television reporter who got the story because none others were present?

Q You were the only one who broadcast it?

A I don't know.

Q Did you look at the other television stations that night?

A Nope.

Q Did you look at the newspapers the next day?

A Yes.

Q The only coverage was the coverage of your story, wasn't it?

A I don't recall. I just glanced.

Q You weren't interested?

A I wouldn't say I wasn't interested. I just, you know -- it was another day and there was other news going on.

Q You have never been charged with a crime in relation to this story, have you?

A No.

Q WPIX hasn't been charged with a crime with relation to this story?

A Not to my knowledge.

Q All the film that you have back at the editing booth -- there was an editing booth, wasn't there?

A Yes.

Q You have the two and a half minutes, you could have cut any part of it out?

A That's right.

Q Up to that time it was all under your control?

A Yes.

Q You did cut out some parts of it as not fitting your needs, wasn't that so?

A Yes.

Q That was your decision and the editor's decision, wasn't it?

A That is right.

Q It wasn't his decision, was it?

A No.

Q Up until that very moment that this film hit the air waves it was strictly between you and Mr. Kelner what had gone on there, wasn't it?

A And anyone else present in the room.

Q It had crossed no state borders at that time, had it?

A No.

Q You have some experience as a reporter and you are used to questioning people under conditions of stress, aren't you?

A Yes.

Q Have you observed, are you aware that people under stress tend to be a little less than precise in what they say? Isn't that your observation in general?

A Sometimes, sometimes.

Q Sometimes they don't say precisely what they mean and sometimes they don't mean precisely what they say, isn't that so?

A Sometimes.

Q And under conditions of strain and high emotion it sometimes would become more frequent, wouldn't it?

A I would suppose.

Q You are used to reading between the lines and fleshing out statements of people to perceive their intent, aren't you?

A I guess.

Q I am sorry. I still didn't hear you.

THE COURT: He said, "I guess."

eoa5 Miller-cross

Q You are aware that Mr. Kelner was under considerable stress at the moment that all the reporters were crowded into this little room; it was a high event; it was 8 o'clock at night, at the end of a working day. You were aware that he was under stress then, weren't you?

A Not particularly.

Q You didn't observe it?

A No.

Q You observed a lot of people crowding around him and thrusting questions at him?

A Yes.

Q You would say that those are the conditions of stress, wouldn't you?

MR. BUCHWALD: Objection.

THE COURT: No, overruled.

A It was done in such a conversational tone that it didn't seem to pose any extraordinary stress. Maybe some.

Q The very fact of Arafat's presence seemed to distress Mr. Kelner, isn't that so? He was concerned and distressed about it?

A I don't know.

Q You heard him talk about justice?

A Yes.

Q Did he seem to be passionate at the moment? Was he speaking out of deep emotion?

A Yes.

Q It was no fake, was it?

A I don't know.

Q You have no means of judging whether a man is faking? He had no reason to fake.

A I may ge fooled by a good faker. I don't know whether he was faking or not.

Q You have no reason to believe he was faking, do you? It seemed genuine enough to you at the time?

MR. BUCHWALD: Objection.

THE COURT: Yes. Sustained.

Q Have you observed when people are under stress they tend to exaggerate a bit?

MR. BUCHWALD: Objection, your Honor. The witness has already testified that he did not observe stress.

THE COURT: Sustained. We have already covered this subject in a general way. The objection is sustained.

Q In covering the story of the JDL and Arafat

you wouldn't have judged it a very good story if that is all you got out of it was a statement from Mr. Kelner to the effect that, oh, Mr. Arafat, he is not a very nice chap; that wouldn't -- it would have been some sort of perverse news, but it wouldn't really be news?

A No, I guess not.

Q You anticipated something more than that, didn't you? Something more forceful than that?

A I anticipated what was on the wire copy, the advisory.

Q You knew something about Yasir Arafat when you went into that meeting?

A A little.

Q Where had you gathered that information from?

A Wire stories; just being around the news room in general you pick up things.

Q Have you ever picked up a clipping in the news room that said that Yasir Arafat --

MR. BUCHWALD: I object.

THE COURT: If you want to tell me what question you want to ask at the side bar, I will be prepared to hear you.

MR. MANDEL: Your Honor, I withdraw that for the moment and we will go to the side bar later,

if necessary.

THE COURT: Very good.

Q During your interview with Mr. Kelner, did it occur to you that Mr. Kelner was trying to dramatize the situation that he found himself in?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Did you observe him dramatizing something?

MR. BUCHWALD: Same objection.

THE COURT: No, I will permit that question.

A Yes, I would say so.

Q How did you observe that?

A Well, my personal observations were the whole thing with the dark glasses and the gun on the table and the Army fatiques and all that was a little showy.

Q Was a little showy or was a little stagey, all a put-on, really, to get some attention?

A Not a put-on. It was a little showy.

Q It was a dramatization?

A Sure.

Q It wasn't meant to be taken in its literal fashion; that is what you observed, was it?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Now, you had attended some demonstrations the week preceding November 11th at which Jews of all sorts, not only members of the JDL, demonstrated and threatened, carried placards, isn't that so?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. MANDEL: Your Honor --

THE COURT: Sustained.

MR. MANDEL: I heard your ruling. May I approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. MANDEL: Your Honor --

THE COURT: What's this got to do with it?

MR. MANDEL: I would like to get in the question of dramatization and that this was all a put-on. I think it bears on the question of criminal intent and one of the things that I am leading up to is that he probably covered for his own service a demonstration at UN Plaza where 150,000 Jews walked up and down and said, "Kill Arafat."

THE COURT: No, I will sustain an objection to that.

MR. MANDEL: Very well, your Honor.

(In open court.)

BY MR. MANDEL:

Q Did it occur to you or did you have any reason from your observations to believe during the interview that what Mr. Kelner was attempting to do was to place in dramatic form his concern for his brethren in Israel?

MR. BUCHWALD: Again I will object as calling for a conclusion.

THE COURT: Yes, sustained.

Q Just to go back over one little thing that I think I may have left out: the choice of the film that is broadcast, the actual choice, is totally yours at your station, right?

A By my own?

Q No. I mean in your station, that is where the choice is made?

A Oh, yes.

Q As a matter of fact, you used the film on the 10 o'clock program that night?

A Yes.

Q Did you have to?

A Did we have to?

Q That is what I mean, did you have to?

A No.

Q You could have saved it forever and never broadcast it?

A That's right.

Q You could have used it three weeks later, isn't that right?

A Yes.

Q Whenever.

Of course, you have no knowledge, I assume -- I am asking you to answer -- that Yasir Arafat ever watches WPIX 10 O'clock News?

A I don't know. Maybe he does.

Q You don't even know whether he speaks English to understand what this fellow was saying, do you?

MR. BUCHWALD: Objection as to relevancy.

A I don't know.

THE COURT: Sustained.

MR. MANDEL: No further questions, your Honor.

MR. BUCHWALD: Very briefly, your Honor.

REDIRECT EXAMINATION

BY MR. BUCHWALD:

Q When you covered the demonstration at the Waldorf before going over to the JDL office, was it your understanding that Arafat himself was already there or that the PLO delegation was there?

A As I recall it, I believe that it was certainly the delegation and there was some question as to whether Arafat was there.

Q There were some questions put to you on cross examination concerning the fact that there is no sound in the beginning of the film which the jury saw.

A Yes.

Q Now, was there ever sound on the beginning of the film itself as opposed to the broadcast where the anchor man is talking and the film is in the background?

Do you understand the question?

A The film preceding the statement that Mr. Kelner makes was shot with a hand-held camera that has no sound. The film that the camera takes has no magnetic stripe. It is incapable of having any sound.

Q So the sound which Mr. Mandel referred to as not having been heard by the jury which went over

the television station was the anchor man describing what the audience was about to see?

A That's right.

Q It was the anchor man's impressions, is that correct?

A That's right.

Q His opinion?

A No.

THE COURT: Sustained. Strike out the answer.

Q The sound had nothing to do with anything that had actually occurred at the JDL headquarters?

MR. MANDEL: Your Honor, I object.

THE COURT: There is really no foundation to put that question in context. You are talking about what we saw here, Mr. Buchwald?

MR. BUCHWALD: That's right. In the very beginning, your Honor.

THE COURT: The first seven, eight or nine or ten seconds there was no sound at all.

MR. BUCHWALD: That's correct.

THE COURT: Now that we are focused on that, go ahead.

Q While that was being shown on television

what sound, if any, was the audience hearing?

THE COURT: The home viewer.

Q The home viewer.

THE COURT: All right.

A They were hearing the anchor man, Joe Harper, reading a suggested lead which I may have written myself.

Q Now, do you remember what the lead was?

A Not offhand.

Q Was that in the nature of what would be the analoque to a headline in a newspaper?

MR. MANDEL: I object, your Honor. He has testified he doesn't know.

THE COURT: Yes, sustained.

Q Mr. Miller, I believe you were asked some questions about whether WPIX were the only people who actually covered this story to the extent of having it on their television or radio or newspapers. Do you recall the photograph that I showed you yesterday?

A Yes.

Q That you identified?

A Yes.

Q Do you know whether that photograph was printed in a newspaper?

A Yes, it was used. Maybe not that photo-

graph specifically, but photographs of that type showing the same thing were used, yes.

Q So then there were other news organizations that did in fact cover the story to the extent of telling the public about it?

MR. MANDEL: I object, your Honor.

THE COURT: I will sustain the objection to that particular question as to its form.

Q Am I correct, sir -- withdrawn.

You were asked certain questions about the editing process on cross examination, and let me put to you now, if I might, the question of whether the end of your interview of Kelner, the part which was not shown on the film, the part that was edited out and followed the portion shown on the film, did he retract or modify anything that he had said previously which was displayed?

MR. MANDEL: Your Honor, I don't think that was covered on cross.

THE COURT: Sustained.

MR. BUCHWALD: I have no further questions.

THE COURT: All right.

You may step down.

(Witness excused.)

MR. BUCHWALD: Your Honor, at this time the government calls Mr. Vincent Milaccio.

MR. MANDEL: May we have a conference at the side bar, your Honor, to speed things up?

THE COURT: All right.

Any objection to raising these curtains?

MR. BUCHWALD: It is my hope to show the film again to the jury in view of its brevity, to show it one more time.

THE COURT: Why don't you do that at the close of the case.

(At the side bar.)

MR. MANDEL: If Mr. Milaccio is going to testify to the effect of the testimony that I have seen in the grand jury minutes, I don't know that it is at all useful and I don't --

THE COURT: I don't know what it is.

MR. MANDEL: I have the grand jury minutes. If that is the offer of proof, then I object to his being sworn. He has no evidence of this event.

THE COURT: I don't know what he is going to say.

MR. MANDEL: I ask for an offer of proof and then we can discuss it.

A That's correct.

Q Directing your attention to the evening of November 11, 1974, were you on duty that evening?.

A Yes, I was.

Q Where was that?

A At our office at 201 East 69th Street.

Q That is the FBI's office?

A That is correct.

Q Will you explain to the court and jury what, if anything, occurred on that evening?

A At approximately 9:30 that evening our office received a telephone call from the New York City Police Department.

Q As a result of that telephone call, what, if anything, did you do?

A I had cause to watch a program on Channel 11, WPIX, at 10 p.m.

Q What, if anything, did you observe during the program?

A I saw the defendant, Mr. Kelner, being interviewed.

MR. DECHTER: Objection, your Honor. This film has been shown and this would be repetitive and certainly not at this time in any way important

eoal9 Milaccio-direct

for testimony. It has already been shown.

THE COURT: Overruled.

MR. DECHTER: Thank you, your Honor.

BY MR. BUCHWALD:

Q Now let me show you Government's Exhibit 1.

And perhaps it would be appropriate, your Honor, to indicate that it was Government's Exhibit 1, the original film which was shown this morning after being put back together.

Mr. Milaccio, if you will step down and take a look at this tape. Are you able to identify the tape?

A Yes, I am.

MR. BUCHWALD: Will you resume your seat, please.

(Witness complies.)

Q Have you previously, prior to today, observed a showing of this particular reel of tape?

A Yes, I have.

Q Was the interview that you saw depicted on the 10 o'clock news on WPIX on November 11, 1974 the same as that depicted on Government's Exhibit 1?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled. You say you saw an interview on WPIX, Channel 11, on that evening?

THE WITNESS: Yes, sir.

THE COURT: You have looked at this Exhibit 1?

THE WITNESS: Yes, I have.

THE COURT: Is there any relationship between Exhibit 1 and the interview you saw on that evening?

THE WITNESS: Yes, your Honor.

THE COURT: What is that relationship?

THE WITNESS: It depicts the interview that I saw on WPIX that evening.

THE COURT: All right.

BY MR. BUCHWALD:

Q As you were watching television?

A That's correct.

MR. BUCHWALD: I have no further questions.

THE COURT: Any cross examination?

MR. DECHTER: Yes, your Honor.

CROSS EXAMINATION

BY MR. DECHTER:

Q Mr.Milaccio, how long have you been employed by the FBI?

A Eleven years.

Q Your assignment during the period of November 11, 1974?

A I was assigned here in New York City.

Q Was there a special assignment that you had regarding the organization of the Jewish Defense League?

A On the evening of November 11th I was assigned to a special duty that involved the visit of Yasir Arafat to New York City.

Q Were there other agencies involved with you other than just the Federal Bureau of Investigation?

A That is correct.

Q Could you name them?

A New York City Police Department and Secret Service.

Q Will you please give me the name of the person in charge of the New York City Police Department who spoke to you?

A I cannot recall his name specifically. However, I believe it might have been Detective Michael O'Connor.

Q Detective?

A Michael O'Connor. However, I am not sure

of that.

Q What division, sir?

A I believe he is with the Intelligence Division.

Q Had you been in contact with Detective O'Connor before 9:30?

A No, I had not.

Q Had you been in contact with anyone in the Police Department before 9:30 regarding Yasir Arafat's visit?

A On the evening of November 11th?

Q Prior to that day, the evening, whichever.

A No, I had not been personally.

Q Anyone in the Police Department, were they in contact with you regarding the Police Department, were they in contact with you regarding the pending visit of Yasir Arafat?

A Not with me personally.

Q With your department?

A Yes, sir.

Q With your supervisor?

A Yes.

Q May I please have his name?

A Dennis L. DeBrandt.

Q His title, sir?

A He is the supervisor.

Q Let me ask you this, Mr. Milaccio: To your knowledge, is there a special unit that is assigned to look at or observe the Jewish Defense League?

MR. BUCHWALD: Objection.

THE COURT: Yes, sustained.

Q Were you aware of the fact that the Jewish Defense League, among many Jews, were extremely concerned about Yasir Arafat's visit?

A I believe it was common knowledge that many people objected to Mr. Arafat's visit to New York City.

Q I am referring to you yourself, sir?

A Yes, I am aware of the fact that many people objected to it, sir.

Q From your viewpoint of being an enforcement officer, on the investigative staff, were you working on this particular end, sir?

MR. BUCHWALD: Objection.

Q Was there any connection between your department, yourself and Yasir Arafat's visit?

A I don't understand the question.

Q Were you interested in his visit, sir?

A Yes, I was.

Q And you were covering as an officer, a law enforcement officer -- were you covering the situation developing at that time?

A Yes, I was.

Q Was it your job, sir, or anyone you were connected with to oversea the security involved of Yasir Arafat?

A We were not responsible for the protection of Mr. Arafat, but in the event that any attack or violation of the law occurred in connection with him, we would be responsible for the investigation of that.

Q You say that you were in contact with the Police Department and the Secret Service. Was it your responsibility as far as security goes in regard to Mr. Arafat?

A Yes. The Police Department, as I understand it, was responsible for the protection of the delegation and the Secret Service had been designated to protect Arafat.

Q Were you informed of their position as far as the protection of Mr. Arafat? Did you know what they were doing?

A I am sorry. I don't understand the question.

Q Well, what is important are the security measures. Were you in contact with that in relation to the Secret Service or the Police Department,and/or the Police Department?

A Yes, my office was in contact with both the Police Department and Secret Service.

Q Could you please tell the court what kind of security measures were there at that time?

MR. BUCHWALD: Objection as to the specifics. I don't mind general nature, but specifics --

THE COURT: Sustained.

MR. BUCHWALD: I object to the specifics.

Q Do you know or are you aware of the tremendous security, helicopters, special policemen assigned in the thousands, to protect Mr. Arafat? Is that a fact, sir?

A I did not witness the actual protective measures for Mr. Arafat.

Q Were you aware of the particular situation, that there was a tremendous amount of security?

A I was aware of the fact that his visit was receiving considerable attention from both the Police Department and Secret Service.

Q Was the security more than usual?

A I cannot characterize it as far as his visit as compared to any others as I am not an expert on what type of measures they use to protect other officials who visit in the United States.

Q Would it be unfair to state that the security measures were unprecedented in the case of Yasir Arafat?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q As far as you know, do you know of any other case where a dignitary or an individual coming from any country received more protection than Yasir Arafat?

A Sir, I have answered that I am not aware of what measures in detail were in effect for Arafat.

Q Tell me in general.

A I do know that both the Police Department and Secret Service were concerned about Mr. Arafat's visit and they had taken measures, the Secret Service to protect Mr. Arafat and the Police Department to protect the delegation.

Q Were there 50 policemen involved or 5000 or 100, do you have any idea?

THE COURT: Objection sustained.

Q There were a great many involved, weren't

there, sir?

A I assume there were.

Q You received that call at 9:30 p.m., right?

A That is correct.

Q Where were you at that time?

A I was in our office at 201 East 69th Street.

Q Is that during your working hours?

A That is correct.

Q What are your working hours, sir?

A Normally from 8:15 to 5 p.m.

Q This was 9:30 p.m. Could you explain that particular situation?

A Yes. We had augmented special coverage during the visit of Mr. Arafat.

Q Then there was additional and exceptional security measures taken, isn't that so, sir?

A Yes, our office had -- as far as my office was concerned, we had arranged for additional coverage as far as people were involved.

Q Were you working overtime?

A No, I wasn't.

Q Was it an additional tour?

A Itwas a different tour.

Q A different tour. How was the tour scheduled,

from what hours to what, sir?

A Four p.m. to midnight.

Q Then there would be someone else taking your place?

A Yes, that's correct.

Q Could you tell the court why was it that you were assigned from 4 to 12 when your tour is usually from 9 to 5?

A With the number of men available and to be certain that there were men available throughout the period of time necessary, the manpower was spread out.

Q Did you have any idea what time Yasir Arafat was going to arrive?

A On the evening of November 11th?

Q Yes, sir.

A No, not exactly.

Q Did you have some general idea? Was it between the hours of 4 and 6?

A That he was to arrive?

Q Yes.

A No, not that I know of.

Q Did you know what time he was to arrive at the Waldorf-Astoria?

A No, I did not.

Q Did you know where he was going to reside during this visit; were you informed?

A I believe that we were informed, although I am not certain of this, that he was to stay at the Waldorf. I am not certain of that.

Q So that you knew that he was staying at the Waldorf-Astoria, isn't that true, sir?

A No. His delegation was already staying at the Waldorf on the evening of November 11th.

Q Well, then you expected that he was staying with his delegation; he wouldn't be staying with any other delegation, would you believe that, sir?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Mr. Milaccio, was it simply your job to look at a TV program?

A No, sir.

Q Could you tell the court in a little more detail what was your specific function?

A Well, I was there to assist in coordinating liaison between our office, the Police Department and Secret Service.

Q How many calls did you get, could you estimate, between the hours of 4 and 12 that day?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Let's say between the hours of 9 to 10.

THE COURT: The number of calls he received is irrelevant. Objection sustained.

Q Regarding --

MR. DECHTER: Your Honor, I respectfully except.

THE COURT: Sustained.

MR. DECHTER: Withdrawn.

Q Could you tell the court how many calls you received from the Police Department or the Secret Service during this time?

MR. BUCHWALD: Same objection.

THE COURT: I assume the objection is continuing. Sir, would you come to the side bar.

(At the side bar.)

THE COURT: Now, I just want to put on the record that when I have made it crystal clear that the number of phone calls are irrelevant I don't want two more questions along that line or I am going to start taking some steps. I am getting tired of you going beyond a question and keeping on with it that way.

MR. DECHTER: I thought that was relevant, your Honor.

THE COURT: I had stated that the number of phone calls he got had no relevance and you continued to press that with two more questions. Just be governed accordingly.

(In open court.)

BY MR. DECHTER:

Q Were you informed, Mr. Milaccio, by some method to watch a program at 10 o'clock?

A I was not informed by anyone. I was informed that -- I took it upon myself to watch the program.

Q You knew no reason for watching that program, sir?

A No, I had been informed by the Police Department that Mr. Kelner had apparently -- or a news conference had been held at the JDL office in New York City.

Q And then you proceeded to watch that newscast?

A That is correct.

Q Did you make any observation or decision after watching that newscast?

A Yes, I did.

Q What was that?

A I think I instructed or advised personally both the Police Department and Secret Service what had transpired.

Q Did you inform them to act at 10:00 o'clock?

A It wasn't my position to inform them what to do. I thereafter discussed the matter with the United States Attorney.

Q What hour was that, sir?

A I believe it was beginning at 10:30 p.m. that evening.

Q In discussing it with the United States Attorney, were you informed to proceed to do anything?

A Yes, the United States Attorney at first asked me if I had advised the local authorities and I informed him that I had done so and the Secret Service and he asked if I could obtain for him the verbatim remarks of Mr. Kelner.

Q Did anything else transpire that evening?

MR. BUCHWALD: Objection as to the form.

THE COURT: Sustained.

Q Did anything transpire which you participated in regarding Mr. Kelner?

A I believe that is the pertinent part.

Q I take you to the next day, is that November 12th?

A That is correct.

Q 1974. Will you please tell me your working hours on that day?

A I believe I worked from 1:30 p.m. on the 13th

until 8:00 a.m. the following morning.

Q Were you in contact with the U. S. Attorney at that time?

A Yes, I was.

Q Was it before 1:30?

A No, it would not be.

Q If you recall?

A No.

Q So that the first time you spoke to them was sometime after the 1:30 hour?

A Let me correct myself. I think I worked from the regular 8:15 to 5:00. However, I was held over until later that evening.

Q So you came to work --

MR. BUCHWALD: Are we on the 12th or the 13th?

Q Are we talking about the next day, sir?

A Yes, I got that confused with the following day. I believe I worked from 8:15 or prior to that, actually arriving in the office, I think I arrived in the office earlier than 8:15 and worked until sometime on the evening of the 12th.

Q At 8:15 did you discuss any of the statements that you had seen with your superiors?

A Yes, I did.

Q Could you name that particular superior?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Now, did you observe your superiors make any decision as to what, if anything, was to be done?

A No, I proceeded along the instructions of the United States Attorney.

Q What was that?

A To obtain the verbatim remarks of Mr. Kelner.

Q How long did that take, sir?

A I am not sure, but it was sometime in the morning or early afternoon of the following day, the 12th.

Q So you are saying about 12:00 o'clock you had the verbatim remarks of Mr. Kelner?

A I am not sure of the exact time. It was early afternoon.

Q Around the 12:00 o'clock hour, is that so?

A Possibly. I have no idea.

Q Do you know who you were talking to in the United States Attorney's Office?

A Yes, I believe I spoke to Mr. Edwards, Thomas Edwards.

Q Were you informed to proceed to do anything, sir?

A As I have previously stated, I was informed to obtain a verbatim transcript.

Q After you received the transcript, sir?

A Yes.

Q Then what happened?

THE COURT: Mr. Dechter, are you going to be much longer?

MR. DECHTER: About five to seven minutes, your Honor.

THE COURT: Do you have any redirect?

MR. BUCHWALD: One or two questions.

THE COURT: Go ahead.

A Yes, the United States Attorney authorized the arrest of Mr. Kelner.

Q What time was that?

A I believe he was arrested at --

Q I'm sorry, what time did he order this arrest?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Were you told to proceed to any address?

MR. BUCHWALD: Objection.

Q Let me ask you this, sir. Mr. Milaccio, do you have notes regarding that particular day?

A I have no notes with me.

Q Is it your usual practice to carry some memorandums regarding your actions in a particular situation which

ends up in an arrest?

A That is correct.

Q You knew you were going to appear in court today, didn't you, sir?

A That is correct.

Q You just neglected to bring those notes with you?

MR. BUCHWALD: Your Honor, I object.

A No, sir.

MR. BUCHWALD: The reports of Mr. Milaccio have been turned over to Mr. Dechter and Mr. Dechter knows that.

THE COURT: We will recess for lunch until 2:00 o'clock.

MR. DECHTER: Your Honor, I would like to make a statement. I respectfully ask the Court --

THE COURT: No, we will recess for lunch until 2:00 o'clock and you can tell me about it in the absence of the jury what statement you propose to make.

MR. DECHTER: Not a statement regarding this.

THE COURT: Mr. Dechter, we are recessing for lunch until 2:00 o'clock.

MR. DECHTER: Thank you, your Honor.

THE COURT: Will the spectators please remain in the courtroom until the jury has had a chance to clear

the floor.

(Jury leaves courtroom.)

MR. DECHTER: Your Honor, it has to do with a character witness who has to leave, a rabbi, and that is the reason.

THE COURT: I don't know what to tell you.

MR. DECHTER: He will be taken out of context.

THE COURT: Do you want to take him at 2:00?

MR. DECHTER: And take him off?

THE COURT: Are you willing to have him at 2:00 o'clock?

MR. BUCHWALD: If Mr. Dechter stipulates that Mr. Kelner will be testifying I have no objection.

THE COURT: Is this your last witness?

MR. BUCHWALD: Yes, your Honor.

THE COURT: Mr. Dechter, tell me this: Mr. Buchwald objects to some of these questions and he objects not to others. This is way beyond the scope of the direct. I assume Mr. Buchwald has a purpose in mind in letting some of this in and letting some of it not in. It seems to me that this is basically wholly irrelevant, but I assume the United States Attorney has a purpose in it. He has been objecting to the last two or three having to do with the circumstances of the arrest of your client.

How do you contend that that is relevant, even assuming it is being admitted essentially as part of your case and not really as cross examination of the witness.

MR. DECHTER: How do I what?

THE COURT: Mr. Buchwald has been objecting now to the circumstances of the arrest. How do you contend that is relevant to your case?

MR. DECHTER: Only because, your Honor, the amount of time before the arrest was made and what statute and under what conditions the arrest was made is very relevant.

THE COURT: I know, you say it, but that doesn't convey anything to me because you are giving me a conclusion.

MR. DECHTER: In other words, if there was to be an arrest and this was going to come out of some statement of facts, I felt that I wanted to bring out to the jury that they really did not have any statute that they were going to get him on; that they were finshing around to get him on a statute and there was every occasion to show that he was arrested on probable cause and that was about it.

MR.BUCHWALD: I think that is irrelevant. I think Mr. Dechter has demonstrated that a prosecutorial decision was made and that was to obtain the verbatim

statement of the defendant.

MR. DECHTER: There is one other reason, your Honor, that is very important. You see, I am attempting to show the jury that if there was such imminent danger to Mr. Arafat and that is why I went into the security and so forth, imminent danger should have been at the time of 10:00, 12:00, 4:00 or 6:00, 8:00 o'clock in the morning, 10:00 o'clock, nothing like this occurred. That is the reason.

THE COURT: I assumed that that is what you were asking those questions for and to that extent you have made your record.

The circumstances of the arrest itself I fail to see any relevance whatsoever. Is anything contended that at the time of the arrest anything was said which sheds any light on the issues?

MR. DECHTER: I am referring to the amount of time.

THE COURT: You have established that and that is in the record because you have taken this witness right up to the point in time in which he has gone out with authority to make the arrest.

What beyond that has any relevance to any issue that we have to try?

MR. DECHTER: Your Honor, at this particular time

I would have to wait to see what Mr. Milaccio would be saying. As far as time, I just made the record, I don't want to repeat why.

THE COURT: Mr. Buchwald has been objecting to this area and from what you tell me, I am going to sustain the objection.

MR. DECHTER: Fine. Respectfully, I know it is late, I did speak to Mr. Buchwald prior to this case starting that there were people from Philadelphia here, there is a rabbi here and it was very difficult to get these people, you know, timewise. I think I mentioned it to the Court.

THE COURT: We will take this gentleman that you mentioned at 2:00 o'clock.

MR. DECHTER: Respectfully, your Honor, I told this to Mr. Buchwald when he put Mr. Milaccio on, I said to Mr. Buchwald, would he be good enough to stop with Mr. Milaccio and put on the rabbi and he couldn't do that and therefore I had to cross examine him and unfortunately I wasn't able to put the rabbi on. That is why I was attempting to get the attention of the Court to put him on before because he cannot come back at 2:00 o'clock. That is the problem.

MR. BUCHWALD: If I might answer on that. I

believe I responded that direct examination would only take five minutes and I believe that that is all it took.

I had no objection to taking the witness out of order at 2:00 o'clock.

THE COURT: Obviously the jury has gone to lunch.

MR. DECHTER: Thank you, your Honor.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 p.m.

(In open court, jury present.)

V I N C E N T M I L A C C I O, resumed the stand and testified further as follows:

MR. DECHTER: May I respectfully have two seconds, your Honor, so I can get my papers in order?

THE CLERK: You remain sworn, Mr. Milaccio.

THE COURT: Mr. Dechter, are you prepared to continue with your cross examination?

MR. DECHTER: Your Honor, when we left, I do not recall the last question. Could we have it read back?

THE COURT: It is not here.

MR. BUCHWALD: I think the last question referred to some notes or reports.

MR. DECHTER: Yes.

CROSS EXAMINATION

BY MR. DECHTER (Continued):

Q Mr. Milaccio, you do not have any further reports than what you stated on the stand at this time, you have nothing further that you can add to what happened that day?

A No, I took my notes and transcribed them in a report which I furnished to the United States Attorney.

Q Did you make any other notes than the ones that

eorf 2 Milaccio-cross

you gave to the United States Attorney?

A No, I did not.

MR. DECHTER: No further questions.

REDIRECT EXAMINATION

BY MR. BUCHWALD:

Q Am I correct, sir, that part of your reason for being on duty on the evening of November 11th was part of a coordinated effort by the FBI and the Secret Service and the New York City Police in connection with Mr. Arafat's visit to the United States and his scheduled appearance befor the United Nations?

A That is correct.

Q Now, with respect to the security measures that were taken, did those security measures increase or decrease, if you know, after you observed the 10:00 o'clock news on WPIX on November 11, 1974?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A As far as the Police Department was concerned, I believe they instituted a surveillance or attempted to have Mr. Kelner and the Secret Service continued to express an interest in his whereabouts and what was transpiring.

MR. BUCHWALD: I offer no further questions.

Q In regard to the statements you just made, Mr. Milaccio, were you kept informed of his whereabouts after he made these statements?

A Not during the night because I wasn't on duty.

Q The following morning?

A On the following day I personally knew of his whereabouts in the afternoon or where he was at that time.

Q But you were on from 8:00 o'clock?

A That is correct.

Q Did you know his whereabouts at about that hour?

A I don't specifically recall that,when I arrived at the office they told me that Mr. Kelner was at such and such a location.

Q I don't hear you.

A I do not specifically recall that at 8:00 o'clock in the morning I was told --

Q Not at 8:00, anywhere between 8:00 and 12:00, did you have an idea of where Mr. Kelner was during all this period?

A I cannot say specifically at what time I learned where Mr. Kelner was.

Q Can you give an approximation?

A I know at the time that Mr. Cahill had authorized the arrest of Mr. Kelner that I made inquiry as to his

present location at that time.

Q Any time prior to that did you have any knowledge where Mr. Kelner was?

A I wasn't personally, but there were other agents in the office who were concerned about that matter.

Q And they knew?

MR. BUCHWALD: Objection, your Honor.

Q Did they know to your knowledge?

THE COURT: Overruled.

A I cannot answer that.

Q Did you ever see Mr. Kelner before that day?

A Yes, I did.

Q Did you know that Mr. Kelner was at 1133 Broadway?

A On that day, sir?

Q Yes.

A Or prior to that day.

Q That day.

A No, I did not.

Q When did you learn that he was at 1133 Broadway?

MR. BUCHWALD: Your Honor, I am going to object as being entirely beyond the scope of redirect.

THE COURT: I am not so sure, overruled. This is the 12th of November?

MR. DECHTER: Yes, your Honor.

eorf 5 Milaccio-recross

THE COURT: You may answer.

A Would you repeat the question, please.

(Question read.)

A I would say it was around 2:00 o'clock. Sometime around then.

Q You knew what offices are located at 1133 Broadway?

A Yes, the JDL office.

Q Did you proceed immediately to 1133 to that office?

A Yes, I did.

Q Could you approximate the time that you arrived at that office?

A I think it was sometime after 3:00 o'clock.

Q Where were you located at the time that you first were instructed to go on to Mr. Kelner?

A At my office.

Q At what time, sir, approximately?

A I would say it was just prior to leaving the office.

Q Would you say 12:00?

A No. I said that the authorization to have Mr. Kelner arrested was immediately prior to departing the office.

Q But were you concerned about the safety of Mr. Arafat, was that your concern, sir?

eorf 6 Milaccio-recrodd

MR. BUCHWALD: Objection.

THE COURT: The objection is sustained.

Q Wasn't one of the reasons you were in contact with the other agencies because of the fact of the arrival and the fact that he was in the United States at that time?

THE COURT: This is beyond the scope of the re-direct.

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Did you finally arrive at the office?

A Yes, I did.

Q Did he attempt to resist in any way?

A No.

Q Did you inform him of what your presence there was for? In other words, did you tell him what you came there for?

A Yes, I did.

Q What did you say, to the best of your knowledge?

A I and the other agent advised him of our identities and I informed Mr. Kelner that -- actually the other agent advised Mr. Kelner that he was under arrest and on what particular charge.

Q What charge? I didn't hear that, sir.

A The charge for causing to be transmitted in interstate commerce a threat to the life of another, and I advised him of his rights and indicated to him the normal rights under our regulations.

Q Could you please tell me the statute at this point?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Do you know what statute it was?

A The title number?

Q The statute, yes.

THE COURT: Do you know the title number?

THE WITNESS: Title 18.

Q Do you know what section?

A I am not certain of it.

Q You have worked on this case pretty much, sir?

MR. BUCHWALD: Objection.

THE COURT: Sustained. Go on to another subject, please. This gentlemen is not a lawyer and his present recollection of that is irrelevant to the case.

Q Sir, did you inform Mr. Kelner of his rights in the office?

A Yes, in the office.

Q Yes or no?

A Yes, I was about to answer. Yes, in the office and I also informed him in the car on return to the office.

Q You stated that there was another agent with you?

A Yes, there was.

Q What is his name, sir?

A C. Edwin Enright.

Q Did he make any statements to Mr. Kelner, to

your knowledge?

A Yes, he did.

Q Are you sure that you told him what section of the law he was being arrested under?

MR. BUCHWALD: Objection. That is not his testimony.

Q Did you state what he was being arrested for, sir?

MR. BUCHWALD: Asked and answered.

THE COURT: Sustained.

Q If I tell you, sir, for your own recollection, that you did not state anything to that effect, and the first time you told him when he was arrested was downstairs on the way to, I imagine, the headquarters, would that refresh your recollection, sir?

A No, it would not.

Q The fact that you did not inform him of his rights until he was in the automobile, would that refresh your recollection, sir?

A No, it would not.

Q Therefore, you stand on what you just said?

A Yes, I do.

Q You don't have your notes with you today, do you, sir?

A No. As I so stated.

Q How could you be sure?

MR. BUCHWALD: Your Honor, I am going to object and ask for a side bar for a special instruction to the jury, if I might.

THE COURT: Sustained.

(At the side bar.)

THE COURT: Mr. Dechter, we are waiting for you.

MR. BUCHWALD: Your Honor, the 3500 material has previously been turned over to Mr. Dechter. He is in possession of all of Mr. Milaccio's reports. There is nothing in there that would remotely be the basis for a good-faith basis for the kinds of questions which have been asked with respect to the reports. I owuld ask, in view of the questioning on the notes and the reports which are in Mr. Dechter's possession that the jury be instructed under the special circumstances here, considering the nature of those questions, about what the government's obligations are under 3500 and the fact that those reports which pertain to his direct examination are required by law to be turned over to the defendant at the end of his direct examination

THE COURT: Do you have any objection to my doing that?

MR. DECHTER: Of course. I respectfully state to the court that there were collateral situations regarding -- he didn't put in the 3500 material, he didn't state every statement that he made, what the arrest said and what it didn't say. If he covered that -- of course, I am not doing anything dilatory or frivolous. I am doing it on the basis that I do not believe that he informed my client specifically regarding the type of arrest that was being made; that's all.

MR. BUCHWALD: The objection that I have is to the suggestion that there is something inconsistent with his testimony here and his report. If you cross examine on the basis of reports, there must be a good-faith basis -- where the cross examination in effect is to suggest that there is something inconsistent in the reports, I think even more demands that that report be turned over.

THE COURT: I can make that statemen-t to the jury even later.

Would you show me some authority that would support making that kind of an observation?

MR. BUCHWALD: Yes, I can.

THE COURT: I could do that even tomorrow morning. I will give the jury another instruction right now.

(In open court.)

THE COURT: I will say to you again, ladies and gentlemen, as I did at the beginning of the trial, when I gave you some preliminary instructions, you must keep in mind that nothing that is said in a question constitutes evidence. It is only the answers to the questions that constitute the evidence.

So where a question is put containing a supposition of facts, unless the witness adopts that supposiqion of facts, whatever has been recited in the question obviously does not become evidence for you to consider. Keep that in mind as you consider what you heard.

BY MR. DECHTER:

Q Mr. Milaccio, did you find any difficulty in poring over the different statutes in order to fit in a statute to arrest Mr. Kelner?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: No further questions.

REDIRECT EXAMINATION

BY MR. BUCHWALD:

Q Was Mr. Dechter present when you arrested Mr. Kelner?

A No, he was not.

Q Was he in the car with you on the way back to the United States Attorney's Office?

A No, he was not.

MR. BUCHWALD: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

MR. BUCHWALD: Your Honor, it was my hope to rest at this point. It was also my hope before resting I would have an opportunity to play the film once again. In view of the short duration of the film it would seem that that would be appropriate. It is not a lengthy film. I think everyone agrees it is an essential aspect of the case.

THE COURT: In my discretion I decline to.

MR. BUCHWALD: Then, your Honor, the government rests.

THE COURT: Ladies and gentlemen, we will

excuse you for a few minutes while we deal with matters of law.

(The jury left the courtroom.)

THE COURT: Mr. Buchwald, obviously you are at liberty to exhibit the film again during your summation should we come to that point.

MR. MANDEL: Will you hear motions?

THE COURT: That is why I excused the jury.

MR. MANDEL: Your Honor, I'll now move to dismiss the indictment and discharge and acquit the defendant for failure of proof.

As I observe the testimony there is no proof of a vital element of the case, to wit, the broadcast in interstate commerce. All of the connection of the plaintiff in this affair makes it strictly a state affair. The statute has to be stretched beyond any reasonable bounds that a criminal statute can be stretched. A criminal statute is to be construed strictly. This is not such a case as fits within the statute and the proof all shows that the transmission, the vital act, was performed by another who was not subject to the control, to the dominion and control, and was not an agent and was totally independent of the accused.

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MR. DECHTER: As a further motion, I respectfully state to the court that based upon the People's case they have not proved their prima facie case and therefore I respectfully ask the court that this case at this time be dismissed basically on the very nature of the fact that the People have not in any performed their duty as far as covering the statute, covering the indictment, Title 18, United States Cod, 875(c), that the statute in itself -- I originally made that motion before we even went into the openings -- the statute itself is much too broad and too vague and does not cover any other crimes. It was a question of congressional position. This particular violation has to do with blackmail, with extortion, with perjury cases, with kidnapping, and based upon my best knowledge there has yet to be an arrest, no less a conviction, for this type of crime.

I respectfully then ask that since the acts of the defendant in no way constitute a crime in violation of 18, United States Code, 875(c), the court at this time should acquit the defendant.

That's our position.

MR. BUCHWALD: Your Honor, the proof with respect to the interstate transmission of the communi-

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cation at trial is that the film, Government's Exhibit 1, was in fact telecast on WPIX, Channel 11, on the evening of November 11th. It is licensed by the Federal Communications Commission. It has a broadcast range of 50 miles, including counties in New Jersey and Connecticut. The viewing of the film in the studio was actually seen by both Mr. Marcovsky and Mr. Miller, who testified it was seen over television by Mr. Milaccio who testified.

Mr. Miller has also testified that on a number of occasions he has viewed WPIX News while in New Jersey and has seen it in New Jersey on WPIX, Channel 11.

With respect to the wilful causation questions, that falls under paragraph 2(b) of the statute. In that connection I would respectfully refer your Honor's attention to United States vs. Scandifia, which is cited in our proposed requests to charge.

In addition, I refer to United States vs. Levine, 457 F. 2d 1186, which is a Tenth Circuit case in 1972. Under that statute it is clear that the innocence of an agent does not diminish the principal's guilt.

There can be no question, it would seem to me

at least, that there is a jury question presented as to whether within the language of this circuit's decision in Scandifia the defendant intended and expected and reasonably foresaw that the threatening communication would be transmitted in interstate commerce. Certainly but for Mr. Kelner's activities there could have been no such interstate communications.

With the meeting, at least arguably, plus the evidence of Mr. Kelner's intent that in fact it be shown, the evidence that a press conference was called some two or two and a half hours in advance, the on concession essentially bh the defense of the fact that the JDL does not like Mr. Arafat is not news, and certainly the argument can be made to the jury that that was Mr. Kelner's intent all along, to get the most possible dissemination of his threat, including television -- in view of all that evidence we would respectfully submit that there is at least evidence sufficient to go to the jury.

MR. MANDEL: Once more in rebuttal.

On the question of interstate commerce, part of the testimony shows that there were reporters there with notebooks. They undoubtedly worked for newspapers which do circulate in interstate commerce.

That's dragging us in by the tail. He was talking in Manhattan, on 23rd Street, to a reporter in Manhattan, on 23rd Street. He was party to no broadcase. He caused nothing to happen. The "but for" argument of Mr. Buchwald will apply to your Honor and to myself and to everybody else. If he was not born this would not have happened. That's not an argument.

This is an innocent agent. This is not the case where one gives a message to somebody and says, "Carry it across the state line and threaten so-and-so." The man was in New York. Arafat was in New York. That's conceded. So was my client. The broadcast is irrelevant. No crime ever occurred. That's my first contention.

The second contention is to ask your Honor to consider the question of if there was a crime when it occurred. It didn't occur when Kelner talked to Miller if there was no dissemination, if there was no transmission.

Did it become a crime when the station broadcast something, an event that might never have occurred? You can't say that he caused an event. It is true it would not have happened without him. That's a different kind of causation. That's not the kind

of causation that can be used to bring a man before 12 good men and true. You don't wring a statute's neck to present no problem of jurisdiction. The whole thing is that the states don't get into the dispute.

This case, if it is a case, is a New York State case. There is no connection with the federal court. It is not a federal case. It's a whole fuss and fury over nothing. It is not a statute that has been violated. There has been no crime committed here and no proof.

If there is any crime, the crime was of Mr. Miller and Mr. Marcovsky. They are the transmission agents. They did it on their own.

MR. DECHTER: Your Honor, just an addition. My learned co-counsel has done a masterful job. At the same time I would like to point out two cases that would be very germane: the case of Dennis vs. United States for one, and it is a case that held --

THE COURT: We don't need this. I conclude that the jury could reasonably conclude that this went beyond the First Amendment position that you are urging.

MR. DECHTER: I am also urging, your Honor -- one more second -- the question of threat. United States vs. Rogers, a classic case, 488 F. 2d 512,

a threat, required by statute, is a serious threat and not words uttered as a political substance arqument and a threat wilfully made is made if, in addition to comprehending his words, the maker utters the words as a declaration of any apparent determination to carry out the threat.

Your Honor, I submit that is not so. It does not come within the statute and I respectfully ask the court to dismiss on that ground.

THE COURT: The motions are denied.

I take it the defendant is prepared to go forward with the case.

MR. DECHTER: We have character witnesses at this time.

THE COURT: We will take a short recess.

(Recess.)

(Jury present.)

THE COURT: Are you ready to proceed?

MR. DECHTER: Yes, your Honor.

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MR. DECHTER: I call Mr.O'Connell to the stand, please.

MR. BUCHWALD: May I approach the bench?

THE COURT: All right.

(At the side bar.)

MR.BUCHWALD: May I ask that other defense witnesse in the courtroom now be excused?

MR. DECHTER: These are character witnesses. None of these people are defense witnesses.

MR. BUCHWALD: I ask they be excused because in certain circumstances I do intend to cross examine.

THE COURT: Then we will excuse them.

(In open court.)

(All character witnesses for the defense left the room.)

J O H N O ' C O N N E L L, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DECHTER:

Q What is your occupation?

A Claims adjuster.

Q Where do you work?

A City's Solicitor's Office of Philadelphia.

Q Do you have any professional license, sir?

A No, sir.

Q Have you attended any school of secondary nature?

A Yes.

Q Name it.

A I attended LaSalle College and after that I attended Delaware Law School.

Q Are you presently a law student?

A I have just graduated.

Q Do you belong to some organizations in Philadelphia?

A I belong to a ski club, sir.

Q Is that a ski club that Mr. Kelner belongs to?

A Yes, sir.

Q How long do you know Mr. Kelner?

A About five years, sir.

Q Did you spend considerable amount of time with Mr. Kelner?

A Normal amount of time, sir.

Q Do you personally know the defendant?

A Yes, sir.

Q Do you know Mr. Kelner's reputation in the community as to his honesty and veracity?

MR. BUCHWALD: I object. No foundation.

THE COURT: Sustained.

Q Have you discussed his reputation with members of the community regarding his honesty and veracity?

MR. BUCHWALD: Objection as to lack of foundation.

THE COURT: We are talking about the community of the ski club, are we not?

MR. DECHTER: Either friends, ski club. I do not hear the objection. I can't hear him.

THE COURT: The objection is that there is no foundation as to what the community is that you are describing.

Q Your address again, sir?

A 1330 Porter Street in Philadelphia.

Q You knew people who are friends of Mr. Kelner?

A At one time I was an intern teacher at the same high school that Mr. Kelner was teaching.

Q You knew others who knew Mr. Kelner?

A Yes, sir.

Q Have you discussed at any time the reputation of Mr. Kelner regarding veracity, honesty and peacefulness?

A Not in so many terms but I know people, I have talked to them about him.

Q Do you know anything negative about Mr. Kelner regarding his veracity or peacefulness?

A No, sir.

Q As far as you know Mr. Kelner is a peaceful and honest man?

A Yes, sir.

Q Is there anything you can add to your knowledge of Mr. Kelner?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: I have no further questions.

MR. BUCHWALD: A few brief questions, your Honor.

CROSS EXAMINATION

BY MR. BUCHWALD:

Q Mr. Kelner doesn't each school presently, does he?

A No, sir.

Q Has he for a few years?

A No, sir.

Q Discussing Mr. Kelner's reputation for honesty and peacefulness with others, when was the last time you had such a discussion with somebody?

A Probably three or four years ago.

Q Three or four years ago?

A Yes, sir.

Q Was it prior to May 13, 1971?

A No, sir.

Q Since then?

pgrf 5 O'Connell-cross

A Yes, sir.

Q And at the time that you had such a discussion were you aware of the fact that Mr. Kelner had on May 13, 1971 been arrested for conspiracy --

MR. DECHTER: Objection, your Honor.

MR. BUCHWALD: For conspiracy in violation of the federal firearms law.

THE COURT: Overruled.

MR. DECHTER: There is no such relevancy to this case. The question of arrest he is talking about -- and I feel that the Court should take notice of this, and certainly it is not germane at all --

THE COURT: Overruled.

A No, sir.

Q You were not aware of that?

A No, sir.

Q The last discussion you had with someone pertaining to Mr. Kelner's reputation for peacefulness, was that prior to April 12, 1973?

MR. DECHTER: Objection to these questions. They have been asked and answered.

THE COURT: Overruled.

A I would think so, sir.

Q It was prior to that?

pgrf 6 O'Connell-cross

A Yes.

Q So since then am I correct you have not had any discussions with anyone else about his reputation for peacefulness?

A Sir, being a member of the ski club we discuss many things and I've never had any discussions as you have suggested about a firearms act or anything like that.

Q Were those discussions in the ski club all prior to April 12, 1973?

A Probably since then.

Q Since as well. Have you heard that in those discussions that on April 12, 1973 Mr. Kelner was arrested in Philadelphia --

MR. DECHTER: Objection. These questions --

THE COURT: Let him finish.

Q -- by the Philadelphia Police Department for breach of the peace?

MR. DECHTER: Objection as far as the type of arrest and the absolute inconsistency with the testimony here.

THE COURT: Overruled.

The question goes to awareness.

A I don't know how to answer that. I was aware that he was picked up by the police for a demonstration

pgrf 7 O'Connell-cross

at sometime or another with the JDL.

Q Have you heard that on October 7, 1973 Mr. Kelner was arrested by the New York City Police Department for possession of a dangerous weapon?

A No, sir.

MR. DECHTER: I respectfully ask for a side bar conference on this.

THE COURT: All right.

(At the side bar.)

MR. DECHTER: If the United States Attorney is attempting through his own efforts to get in the fact that this man has been arrested I would concede to the fact that based on the information I have he may very well have been arrested. To my knowledge he has not been conficted of any crime to date. Allowing in arrests not only is not even fundamental your Honor, but reputation of a person has nothing to do with whether he has been arrested. Anyone could be arrested. It is whether he has been convicted. Where does that fit in as well as his reputation? Whether he is convicted is most, most germane here.

THE COURT: Let me say this: As I remember Michaelson and others that I had to deal with in the United States Attorney's Office some 20 years ago, if you put in through a witness the good things that are afloat about

pgrf 8 O'Connell-cross

him in the community the prosecutor may come back and cross examine as to whether the witness is not aware of certain bad things afloat in the community. As long as he does so he has a reasonable basis for asking the questions.

MR. DECHTER: True, except when you come to an arrest as compared to a conviction that is reversible error. When you allow arrests, I have to say any one of us in this courtroom may have been arrested. Where does that have anything to do --

THE COURT: It bears upon the reputation the man has in the community. The question has everything to do with what his reputation is. On the basis of this witness' testimony, on that score, it becomes relevant to the cross examination. The objection is overruled.

MR. DECHTER: I find unless there is any conviction here, any statements made by the United States Attorney at this point has certainly inflamed the jury; it is being prejudicial and for the Court to allow such statements in, I feel it is a basis for reversible error.

3a pm eorf 1 O'Connell-cross

(In open court.)

MR. BUCHWALD: May I proceed, your Honor?

BY MR. BUCHWALD:

Q In your discussions, sir, had you heard that on December 20, 1973 Mr. Kelner was arrested by federal authorities for assaulting a foreign official, namely, an Egyptian diplomat --

MR. DECHTER: Objection.

Q -- after entering without permission the Egyptian mission.

THE COURT: Overruled.

A I don't know, sir. Was that the gentleman we were speaking of here today?

Q No.

A No, sir.

Q Have you heard that since the time of the incident involved in this case and on January 19, 1975 in front of the Russian Embassy at Third and 67th Street the defendant was arrested by the New York City Police for disorderly conduct?

MR. DECHTER: Objection, your Honor. That is not a crime at all. The United States Attorney has now come way past the point, it is not even a violation and I think the U.S. Attorney is now at this point being inflammatory.

eorf 2 O'Connell-cross

I respectfully ask the Court that when there is a question here that we are talking about the man's reputation or honesty or peacefulness, we are talking certainly that we don't require a defense for Mr. Kelner, yet at the same time we must be discussing it, I think the Court well knows, and it is a question, of course, of law, but the jury is listening and I feel it is very, very unfair and it is a violation of the Fifth and Fourteenth Amendment and due process for my client.

THE COURT: Overruled.

A I don't remember the question.

MR. DECHTER: A violation, your Honor. He said disorderly conduct. Am I wrong? A violation is not a crime, your Honor.

THE COURT: Overruled.

Read back the question.

(Question read.)

A As I think I said before, I do know that he was picked up by the police in some kind of a demonstration. I don't know whether it was in New York or in Philadelphia.

Q Have you heard, sir, that on February 10, 1975 the defendant was arrested by the New York City Police at New York City's Temple Emanuel on Fifth Avenue on charges of criminal trespass after refusing to leave the

synagogue?

A No, sir.

MR. DECHTER: Objection. I respectfully state that most of these cases, if not all, these charges were never even filed, your Honor; that the U. S. Attorney well knows that what he is doing at this point is reading from some kind of a report that is either inaccurate or that he is doing this with full knowledge and I certainly respectfully ask this Court that these questions are not germane. There were no charges filed and at this point every one of these questions should be disallowed.

THE COURT: Overruled.

A No, sir.

Q Have you heard that on March 6, 1975 the defendant was arrested by the New York City Police at the United States Mission to the United Nations and charged with criminal tespass, malicious mischief and resisting arrest?

A I don't think so, sir.

Q On November 11, 1974 did you see a telecast of an interview with Mr. Kelner?

MR. DECHTER: Objection, your Honor, absolutely irrelevant. A telecast respectfully.

THE COURT: Overruled.

Let's have a side bar on this, if you will,

eorf 4 O'Connell-cross

please.

(At the side bar.)

THE COURT: Where are you going to get to with this question?

MR. BUCHWALD: That he is not really aware of the facts involved in this case.

MR. DECHTER: The facts in this case?

MR. BUCHWALD: Yes.

THE COURT: Sustained.

(In open court.)

BY MR. BUCHWALD:

Q As a teacher, am I correct, Mr. O'Connell, that you have a great deal of contact with children, young people?

A Are you speaking of myself, sir?

Q Yes.

A I was an intern teacher, yes, sir.

Q All teachers have contact with young people, do they not?

A Yes, sir.

Q And one of the functions of a teacher really is to be an example, isn't it?

MR. DECHTER: Objection, your Honor, irrelevant. Totally far afield. Objection.

MR. BUCHWALD: I withdraw the question. I have

eorf 5 O'Connell-cross/redirect

no further questions, your Honor.

THE COURT: All right.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. DECHTER:

Q Sir, on the dates that the U. S. Attorney referred to, were you aware of the fact that most of those cases, if not all, no charges were ever lodged? Were you aware of that, sir?

A No, sir.

MR. BUCHWALD: The witness has testified that he hasn't even heard about most of them.

THE COURT: Sustained as to form.

Q Did you hear of the fact that these arrests, so-called arrests, they weren't even charged and weren't brought into the precinct in many of the cases?

A The one incident I know about, I don't think there was a conviction, but the rest of them I don't know anything about.

MR. DECHTER: No further questions.

MR. BUCHWALD: I have no further questions.

THE COURT: Step down, thank you very much.

(Witness excused.)

MR. DECHTER: Your Honor, could we have a side bar

eorf 6

for a moment.

(At the side bar.)

MR. DECHTER: Your Honor, I ask that since he has already put all of these arrests on the record that he is not going to do this again with every one of the people that we spoke about because that would be totally unfair and it would really be pushing it too far. All of these peop heard.

MR. BUCHWALD: I am not planning on actually going through it with each one. There are I think five or six arrests that I left out from this witness that I might go into with the next. I might repeat some of them. I am not planning on going through the whole list. I think it would be appropriate and proper if I did so.

THE COURT: Mr. Dechter, as I understand it, if you put a person on the stand to testify about this man's reputation for such things as peacefulness an appropriate area of cross examination is an absence of peaceful disposition and if the man has been, in fact, arrested, it seems to me that is a relevant matter to ask the witness about and whether he has had to test the accuracy, honesty, validity of his opinion.

Because if a man says that your client is peaceful and it turns out he has heard about eight arrests for

eorf 7

disorderly conduct and this that and the other, the jury might conclude that he was a wee bit biased in his direct testimony.

MR. DECHTER: Your Honor, I respectfully state that an arrest, I will just be repeating, any person can be arrested any number of times. The application is for civil service or any other decent job does not talk about arrests. They talk about convictions.

THE COURT: We are talking about reputation.

We are talking about reputation in the community and not a criminal record.

MR. DECHTER: Especially the conduct which the Court knows is no crime, there is no criminal charge called disorderly conduct. It is an offense.

THE COURT: Disorderly conduct is inconsistent with peacefulness which is the basis I have permitted it to be answered.

MR. DECHTER: You are dealing with offense. It is only one of many, but as far as criminal charges go, I think that the criminal charges, unless there are convictions they should not be gone into.

Since the statements have already been made, there is no reason to repeat the same thing.

THE COURT: I know, but you have to test the

corf 8

direct examination of each witness to determine whether that person really knows what he is talking about.

MR. MANDEL: Your Honor, I think that Mr. Dechter could make a concession as to an arrest record and make it there and I don't think this has to be repeated.

THE COURT: As I have said before, if you put a witness on who says that the community knows the man to be peaceful, the prosecutor is entitled to test whether that is a biased or unbiased or accurate or inaccurate statement.

MR. MANDEL: I think you are right that they are entitled to it.

On the other hand, we have a considerable arrest record. The witness is going to take the stand and I think that this continual dunning is not going to get to any point. He is not proving that these arrests occurred. He is simply saying did you hear of it to test their knowledge.

He is not going to bring in proof of the arrest record. He has no right to do so.

THE COURT: He is doing this to test whether or not the witness is a partisan, whether the witness is biased, whether the witness is, in fact, telling a falsehood. He is entitled to test those things. The witness gets

eorf 9

on the stand and says the man is peaceful and it turns out he has been involved in a lot of arrests for disturbing the peace, the jury could conclude the witness was biased to the eyeballs. Am I right?

MR. MANDEL: Well, your Honor, if you are going to ask me to rule where you have to rule, I will respectfully decline.

MR. DECHTER: I will say for the record.

THE COURT: I am not,so instruct the assistant.

MR. MANDEL: Your Honor, I think that if that is your ruling and I think the arrest record should be suppressed, I think I agree with counsel here, but if that is your Honor's ruling and we have live with it, I think we can very well consider not putting any further character witnesses on and going right to the defendant.

I ask your Honor now whether you would recommend that procedure.

THE COURT: That is a determination you must make as counsel.

(In open court.)

THE COURT: Mr. Dechter, why don't we take a ten minute recess.

MR. DECHTER: Your Honor, we are ready to proceed. All right, we will take ten minutes.

corf 9a

THE COURT: Ladies and gentlemen, we will stand in recess for ten minutes.

(Recess.)

(In open court; jury present.

MR. DECHTER: Your Honor, respectfully, I have a motion which I would like to make at the side bar.

THE COURT: All right.

(At the side bar.)

MR. DECHTER: This is in regard to a Sanderval motion,which is known in the criminal courts and the Supreme Court and every other court. Certainly part of a person's prior arrest record, if it is the position of the U. S. attorney to put on -- to bring up his prior arrests or convictions for moral turpitude, then I state that this is prejudicial to the defendant, and according to Sandeval, and I make a motion that all these arrests or convictions be excluded. This is a case --

MR. BUCHWALD: If I might just have 10 seconds, your Honor.

MR. DECHTER: -- because we have enough cases --

MR. BUCHWALD: Your Honor, I am not familiar with Sandeval, which I gather is a New York State case, but as I understand it what the defense is requesting is a decision in advance by your Honor as to whether

eoa2

or not your Honor will exclude questioning about arrests in the event that the defense calls further character witnesses.

THE COURT: I thought I had already ruled on that.

MR. BUCHWALD: I might site U. S. vs. Evanchik, which is 413 F 2d 950, Second Circuit, 1969, which holds indeed that the court need not render any advance ruling as to the scope of cross examination of character witnesses.

MR. DECHTER: To deny the Sandeval motion, your Honor, I believe that if this ever were to go that far, it is reverisble error and we respectfully ask the court that there is no relevancy. His prior arrest record should not be brought up. It is absolutely prejudicial to the client.

That is the latest decision in New York, your Honor.

THE COURT: I decline the motion.

MR. DECHTER: You are going to allow that?

THE COURT: I decline to so rule.

(In open court.)

MR. DECHTER: Arnold wolf, please.

eoa3

A R N O L D W O L F, called as a witness by defendant, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. DECHTER:

Q Sir, are you a rabbi?

A Yes.

Q Would you please tell me whether you have any title within your particular area, which is Cwown Heights, any title at all with any organization?

A I am vice president of the Crown Heights Clergy Council.

THE COURT: Crown Heights?

THE WITNESS: Clergy Council.

A National vice president of Aguvath Israel Benevolent Society.

I am a member of Community Planning Board No. 8; on the board of the 66th Precinct Community Council, Police Community Council; on the board of Brookdale, of the Hospital Ambulatory Committee.

Is that enough for you or do you want more.

Q Well, are there any other organizations that you are involved with?

A I am a director of the City Corporation for

Urban -- I am on the board, not a director; I am on the board, City Corporation for Urban Concerns.

Q Would you tell the court what that is, sir?

A That is a community-based organization which is concerned with Jewish poor throughout the City of New York, whatever their needs may be, whether it be job placement, welfare, Medicare, Medicaid, lunches, whatever their necessities may be.

Q Please tell the court regarding your being vice president of Crown Heights Clergy Council. Does that include other than people of the Jewish faith?

A That is an interfaith clergy council of all ministers of all faiths concerned about the community. Any people in the community that need any type of help.

Q Are you personally involved in the Crown Heights area in any different capacities as a volunteer?

A Well, I was one of the organizers of the Crown Heights Jewish Community Council.

Q Are you further involved in national organizations working on behalf of certain ideals?

A Well, Aguvath Israel is a national organization.

Q What is the name of it?

community regarding his veracity, honesty and peacefulness?

MR. BUCHWALD: Can I have the question read back?

Q Have you discussed that fact with others?

MR. BUCHWALD: May I have the question read back, your Honor?

THE COURT: Yes.

(Question read.)

A Yes.

Q Could you tell us what that reputation is?

A I would say that he is a very sensitive individual, sensitive to the needs of the oppressed, Jewish oppressed, if I may use that word. He may have a big mouth, but dogs that bark don't bite. He is trustworthy, reliable, truthful.

Q Is he peaceful?

A I haven't seen him otherwise. He opens his mouth, that's about the extent of his unpeacefulness.

Q Rabbi, I ask you this: the fact that Mr. Kelner has been arrested a number of times growing mainly out of demonstrations, if not all, does that fact change your mind?

A If I recall correctly, I think I brought him

coffee in jail. The fact that he was arrested, if the police give an order to move on and they don't move on, the police arrest. They have the right to arrest for such, but then again this is the purpose of the demonstration, is to arouse public opinion, so they don't move on. But I would say this is a sensitivity of his soul where he feels he's got to express what he feels is oppression, what he feels is an injustice.

He wasn't arrested for violence, to the best of my knowledge. He was arrested at a demonstration last week or two weeks ago, they arrested a hundred-and-some-odd people.

Q Let me ask you this: Are you aware of the present arrest and did you discuss the present arrest that he is here today for, regarding allegedly a threat made? Are you aware of that?

A Yes.

Q Does that sway you in any way?

A I am sorry?

Q Does that sway you, sir?

MR. BUCHWALD: Objection.

THE COURT: Yes, sustained. It is a question of whether it affects his assessment of the reputation in the community.

Q Does the fact that he was arrested for this particular crime, if proven -- does that affect his reputation, as far as you are concerned?

A As far as the community is concerned, this entire thing was a joke.

MR. DECHTER: No further questions.

MR. BUCHWALD: I have no questions of this witness, your Honor.

THE COURT: Thank you very much.

(Witness excused.)

MR. DECHTER: Mrs. Gwertzman.

A D E L A I D E G W E R T Z M A N, called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DECHTER:

Q Mrs. Gwertzman, where do you reside?

A 25 Melrose Drive, New Rochelle.

Q Is that in Westchester?

A Westchester, yes.

Q What is your occupation?

A I am in charge of personnel at my husband's office.

Q What does your husband do?

A He is an attorney, Max J. Gwertzman.

Q Where does he practice?

A 115 Broadway.

Q Mrs. Gwertzman, do you belong to any organizations that are known in the society, different groups?

A I am a member of the Hunter Alumni in Westchester; I am a member of the Sylvia Pometh Wiener League for Cardiac Children in Westchester; the B'Nai B'rith.

Well, there are a lot of other charitable organizations that I am a token member of, yes.

Q Do you personally know Mr. Kelner?

A Yes. I have known him last summer for three months when he worked in our office.

Q He was employed by your firm?

A Yes.

Q Your law firm?

A Yes.

Q Would you describe the duties of Mr. Kelner?

A He was a trial preparation man and investigator on the cases that we were assigned by the companies.

We handle work for the insurance companies and we prepare them for trial, and he was one of the

investigators that we had.

Q Did you have daily contact with him?

A Oh, yes. I engaged him. I interviewed him.

Q Please raise your voice. I don't hear you.

A I say I interviewed him and I engaged him when he applied, and he met all of our demands and our qualifications. He was very well qualified to do the type of work that we did.

Q I ask you, Mrs. Gwertzman, whether you have discussed at any time the reputation of Mr. Kelner with others, either in your employment or in your community?

A Well, in our office I have.

Q Excuse me, I did not finish. It is my fault. Regarding his reputation for peacefulness, veracity and honesty?

A Well, all I can say is that we were very surprised when we saw the pictures in the paper --

THE COURT: Mrs. Gwertzman, that is not an answer to the question.

Would you read the question back, please.

(Question read.)

A Yes, I have.

Q What is that reputation?

A He was one of the quietest, diligent, most diligent workers that we had in our office, he was very dependable and gentle, I mean very quiet and very efficient, and whatever assignments he had --

THE COURT: I feel I have to strike out that answer.

What was his reputation? That is the question that was asked.

THE WITNESS: His reputation--

THE COURT: From talking to others, what was his reputation?

THE WITNESS: That he got along very well with others and that he was dependable.

If Mr. Conkley, who was in charge of the investigators, would give him an assignment, he knew it would be carried out and carried out efficiently and well. And if he had to be somewhere at a certain time, he would be there.

You never had any doubts about the character of the man. He just was a man of great integrity. He is a man of great integrity.

Q Let me ask you this: the fact that Mr. Kelner was arrested a number of times, would that change your mind about his reputation?

A Not at all. Not at all, because being arrested does not mean you are guilty. We are in the legal field. We are in courts constantly and we know that just a charge of an arrest, anyone can sue someone. We are in civil so we don't know too much about criminal, but we know a person can be arrested but still be innocent unless convicted.

Q A person may not even be charged other than arrested. Would that surprise you?

A Yes.

Q It is not unknown to you that a person may be arrested but then not follow through with an actual charge in court?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q The fact that this happened does not in any way change your feelings towards his reputation?

A Not as a person, no.

MR. DECHTER: I have no further questions.

CROSS EXAMINATION

BY MR. BUCHWALD:

Q When he was given an assignment during the three-month period you knew him last summer, I take it he was dependable?

A Very much.

Q He said he was going to do something and he got it done?

A If he had an assighment he didn't welch on it; he took care of it. He wrote up his reports and got them in in time.

Q Did you personally interview him for the job?

A Yes.

Q In discussions with others in which you testified as to his reputation for peacefulness, did you hear he had been arrested prior to the time you heard him?

A No.

Q I take it he never told you that?

A I never asked if he was arrested.

Q When he applied for the job --

MR. DECHTER: Objection. These questions have been answered.

THE COURT: He has not completed his question.

Q When he applied for the job in your husband's office, did anyone inquire whether he had ever been in trouble with the law?

A When you see a background of a man who has been --

THE COURT: No, no.

A We don't expect anyone to be arrested who has been qualified to teach or he would not be teaching.

MR. BUCHWALD: I have no further questions.

REDIRECT EXAMINATION

BY MR. DECHTER:

Q The very fact that Mr. Kelner was arrested either before or after, does that change your feeling with respect to this reputation?

MR. BECHWALD: Objection.

A Not at all.

MR. DECHTER: No further questions.

MR. BUCHWALD: I have no further questions.

THE COURT: You are excused.

(Witness excused.)

A R T H U R M I L L E R, called as a witness by defendant, having been first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. DECHTER:

Q Your occupation, sir?

A I am an attorney.

Q Are you presently in practice?

A Yes.

Q The name of the firm?

A I am presently with the firm of Main, Lafrentz & Company in Manhattan.

Q What type of litigation is that?

A I am a specialist in tax practice.

Q How many years are you in practice, sir?

A Eight years.

Q Can you tell the court what degrees you have earned over the period of years?

A I have my Bachelor's degree from City College of New York. I have a Juris Doctorate from Brooklyn Law School, and a Master of Law degree from NYU.

Q What about professional groups?

A I am a member of the American Bar Association, the American Bar Association Section of Taxation, and

a committee for the American Bar Association. I am a member of the New York State Bar Association.

MR. BUCHWALD: I object on the grounds of relevance, your Honor.

THE COURT: Overruled.

A I am a member of the Tax Committee of the Tax Section of the New York State Bar Association, and I serve on two committees of that Tax Section.

In addition, I am a frequent lecturer at the American Management Association for courses given by management in business.

Q In your social contacts do you belong to charitable groups?

A I am a treasurer of the Jewish Identity Center of Jerusalem, Inc. I am also counsel for several synagoques in my neighborhood to which I donate services without compensation. In addition, I serve as counsel and adviser to several other charitable and religious organizations within the neighborhood for which I serve without compensation.

Q Do you know Mr. Kelner?

A I know Russell Kelner for approximately three years.

Q The fact that Mr. Kelner has been arrested

a number of times, would that influence your feelings towards Mr. Kelner?

A As a matter -- no, it would not. As a matter of fact --

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Mr. Miller, have you discussed with members of your firm or in your community the reputation, general reputation, of Mr. Kelner as far as his reputation for peacefulness, veracity and honesty?

A Yes, I have.

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Where do you live, sir?

A I live in Flatbush.

Q The exact address?

A 1808 Avenue R in Brooklyn. My practice is in Manhattan. My office is at 280 Park Avenue, and as a treasurer of several of the Jewish Identity Centers I also spend a good deal of time at 1133 Broadway in the Borough of Manhattan.

Q Have you discussed the reputation of Mr. Kelner with others as to his reputation for honesty, veracity and peacefulness?

A I've discussed his reputation for those items in all these areas: one, where I reside, where I practice, and where I donate my services to charity.

Q What is that?

A He has a wonderful reputation within the community with respect to his honesty, devotion to his people, his dedication to his cause, to his people for helping people, his reputation for peacefulness is again one of his highest characters.

The general feeling of the community when they heard the statements which were attributed to Mr. Kelner was one of complete shock.

MR. BUCHWALD: Objection.

THE COURT: Sustained. Strike out the last.

Q The fact that Mr. Kelner had a series of arrests, does that in any way influence your feelings towars him as for his reputation for peacefulness?

A No. Again, I am familiar with all of his arrests having represented Mr. Kelner in several of those charges. All of the charges, to my knowledge, did not represent crimes or allegations involving nonpeacefulness. They were all acts of peaceful protest in demonstration of the rights of oppressed people throughout

the world; so that the fact that he has been arrested for these things are well within the character of a peaceful, honest person.

Q If it came to your attention that he was arrested for something which the United States attorney would consider illegal, would you change your opinion as far as his character?

A No, sir.

MR. BUCHWALD: Objection.

THE COURT: Sustained. Strike it out.

Q The fact that Mr. Kelner was arrested on different charges, does that fact in itself change his reputation as far as people whom you know and his character in the community?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: No further questions.

CROSS EXAMINATION

BY MR. BUCHWALD:

Q I take it you have been Mr. Kelner's attorney?

A In some matters.

Q Not tax matters?

A Not that I can recall, no.

Q He was arrested and you represented him?

A Some matters were following an arrest and others were business matters.

Q 1133 Broadway, what is that?

A That's an office of the Jewish Identity Center, which is a charitable organization incorporated under the laws of New York State and exempt from taxation under the Internal Revenue Code.

Q Is the JDL office there too?

A Yes.

Q You have been there?

A Yes.

Q You have seen Mr. Kelner in that office?

A Yes.

Q You have seen him sitting --

MR. DECHTER: Objection to the irrelevancy of the questions --

THE COURT: He has not finished.

MR. DECHTER: I have heard the question, the question before that and the question from that.

MR. BUCHWALD: This is as to how well he knows the defendant, your Honor.

Q Have you seen him sitting behind the desk depicted in Government's Exhibit 3?

A That particular desk? I recognize the picture as being of Mr. Kelner. Whether or not I have seen him in the office behind that particular desk -- I thought the picture of Rabbi Kahaner was on the other side. I have seen him in the JDL office, yes.

Q Back in November of last year he did have a desk there, did he not?

MR. DECHTER: Objection to any relevance to these remarks.

THE COURT: Sustained.

Q I take it you consider yourself a friend of Mr. Kelner's?

A Well, my original acquaintanceship did not start out as a friendship.

Q What do you consider him as right now?

A A friend, and proud of it.

Q You indicated that you were not aware of any arrests in other than demonstrations, is that correct?

A Yes, I believe that's correct.

Q Have you heard of any such arrests in discussions with people when you arrived at your testimony of his reputation for peacefulness?

A Excuse me. Repeat the question.

(Question read.)

A No. My observation as to the arrest record is based on my own viewing of Mr. Kelner's arrest record which was handed to me as his attorney.

Q Have you heard that he was arrested by federal authorities on December 20, 1973 for assaulting a foreign official, namely, an Egyptian diplomat?

MR. DECHTER: Objection.

THE COURT: Overruled.

Q Have you heard that?

A I was aware of it. I had not heard that through the community.

Q You didn't represent him in that case, did you?

A No, I did not.

Q Have you heard that he was arrested by the New York City Police on February 10, 1975 at Temple Emanuel on charges of criminal trespass after refusing to leave the synagogue?

A I was aware of that. That is not crimes within the reputation I testified to.

Q Did you hear about that in the community?

A Not with respect to Mr. Kelner. I am aware of that as a member of the JDL and not within the community itself. The community does not regard that as crimes.

Q You do not regard it as a crime?

A I regard it as a violation of the law if he is found guilty. I do not necessarily regard saving people who are oppressed as a crime. In fact it is a requirement under my religion.

Q You yourself are a member of the JDL?

A Yes, and proud of it.

Q Have you heard that on May 13, 1971 Mr. Kelner was arrested by federal authorities in Philadelphia for conspiracy to violate the Federal Firearms Act?

A No.

Q I take it --

MR. DECHTER: Objection, your Honor as to whether this constituted a crime and even if it was a crime whether

pgrf 2 A. Miller-cross

this should be admitted since I do not believe that it was charged subsequent to that --

THE COURT: Objection overruled.

A I am not usually in Philadelphia and hear what goes on there.

Q Is it your testimony, sir, that given your membership in the JDL and your association with the JDL and your own personal views that assault upon a foreign official is not --

MR. DECHTER: Objection to what the personal views of the character witness is here. What is germane here is what Mr. Kelner's reputation is. There is no reason for this --

THE COURT: Overruled.

Q -- is not something which forms part of the man's reputation?

A Repeat that.

(Question read.)

A It may or may not depending on the attending circumstances. If one were to assault a foreign official per se yes, that may have a bearing on my own evaluation of his reputation. I do not consider Mr. Arafat -- we won't call him a foreign official; I consider him a murderer- any statements made with respect to Mr. Arafat, any person

who makes such statements about him, his character goes up in my book, his character with respect to the entire community goes up.

(Applause in court room.)

A The entire community whether they belong to JDL or not express the feelings that Mr. Kelner has expressed knowing my affiliation with JDL.

THE COURT: I will make a statement that this is a court room in which we are trying a case and the jury is to decide the case here on the evidence they hear in the court room. If I hear any more of this I will have the court room completely empty.

You may proceed.

Q Am I correct, sir, that as a member of the Bar of the State of New York, a member of the ABA and New York State Bar Association with eight years of practice as a lawyer, that it is your personal view that an assault upon someone with whom you disagree, with whom you disagree strongly, such an assault is not a crime?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

MR. DECHTER: Objection, your Honor. It has to do with whether there is any conviction here and not the views --

pgrf 4 A. Miller-cross

THE COURT: The jury is required to assess each witness that gives testimony. The objection is overruled.

MR. DECHTER: I respectfully state to the Court that the U. S. Attorney is going far afield where he is attacking the character of the person sitting here which detracts from Mr. Kelner who is on trial.

THE COURT: Your objection is overruled.

THE WITNESS: Rephrase the last part.

MR. BUCHWALD: May we have the question read back?

THE WITNESS: Just the last part but,okay.

(Question read.)

A Depending on the degree of disagreement, most definitely. If one were to get up and said to put me in an oven, an assault on him is not a crime but justified most definitely.

MR. BUCHWALD: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. DECHTER:

Q In regard, Mr. Miller, to statements made by the U. S. Attorney of an arrest allegedly on an Egyptian official, are you aware of the fact that Mr. Kelner was not even charged with this crime? As a matter of fact he was assaulted by an Engyptian. Isn't that something

pgrf 5 A. Miller-redirect

you are aware of, sir?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Overruled.

A Yes, sir, I am aware of it. In fact my outrage at hearing what happened to Mr. Kelner --

THE COURT: No, no. That's it. You have answered the question.

Q Mr. Miller, do you know or have you seen any crimin record of convictions for Mr. Kelner as his attorney at any time?

A In none of the matters which I represented him to my knowledge was he found guilty in those instances.

Q To your knowledge, today, are you aware of any convictions that Mr. Kelner has?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Overruled.

A No, sir, I do not.

MR. DECHTER: No further questions.

THE COURT: Anything further?

MR. BUCHWALD: Nothing further, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. DECHTER: I call Russell Kelner to the stand, your Honor.

pgrf 6

R U S S E L L K E L N E R, being duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DECHTER:

Q How old are you, Mr. Kelner?

A 34 years old.

Q Where have you resided other than New York?

A I lived most of my life to be specific 32 years in Philadelphia.

Q So you have been in New York for two years?

A That is correct.

Q Would you tell the Court about your educational background?

A I'm a graduate of Pennsylvania State University. I majored in Spanish language culture and literature. I am also a graduate of the Army Reserve Officers Training Program having received orders for the Panama Canal Zone as a second lieutenant.

I as well have had post-graduate experience. I studied in Spain at the University of Valencia on a fellowship from the School District of Philadelphia. Also I spent a summer in Israel with another fellowship from the Board of Education in Philadelphia studying at Tel Aviv University.

pqrf 7 Kelner-direct

Q Could you tell the Court what your employment recor has been subsequent to graduating college?

A I taught in the school system at Philadelphia as a high school Spanish teacher for ten years.

Q Are you a licensed certified teacher?

A In Pennsylvania, I have tenure. I taught for ten years as a high school Spanish teacher and served one eight month period in 1968, 1969 as an acting department head supervising 18 teachers in a combined department of foreign language, music, home economics and art.

In addition, I had taught workshops in certificate course for Spanish teachers and also French teachers emphasizing the modern methods and language instruction.

Also in the school district of Philadelphia I was a referee in the sport of soccer for intercollegiate games, also having served for the National Collegiate Athletic Association, as a referee for collegiate games.

Since my teaching in Philadelphia -- I actually left the school system in Philadelphia in 1973 to fill a position that was vacant in the Jewish Defense League in New York because I felt that the situation that was in the mildest a strong organization was necessitated by the Jewish community in America for supporting the survival and the existence of the State of Israel. I took the job with the

JDL in New York in 1973.

Last year, about the middle of 1974, the Jewish Defense League underwrnt a reorganization and at that time, as a previous witness has testified, I worked for the Gwertman law firm in Manhattan as an investigator and trial preparation assistant.

Q Are you presently a paid employee of the Jewish Defense League?

A Yes, I am.

Q What office do you hold?

A I hold the office of office manager and sometimes called operations officer, at 1133 Broadway.

Q What duties does an office manager for the Jewish Defense League entail?

A My duties entail coordinating the activities of the organization, making sure that there is communications between the national office in New York and the chapters throughout the United States and in England, Australia and Canada, to make sure that the membership process and fund raising processes are carried out effectively on a day by day basis.

I also assist in the preparation of demonstrations, preparations of public relations materials, press releases, signs, public relations paraphernalia, that are all used

for carrying an issue to the public by way of demonstrations.

Q Have you had experience with young students, Mr. Kelner?

A Yes.

Q What is your relationship?

A I taught, of course, for ten years in the school district at Philadelphia at the high school level. In addition to that I had some experience when I was just beginning my teaching career and teaching junior high school for several months. In 1967 and 1968 as well I coached soccer for the Department of Recreation in Philadelphia, boys teams of the ages of about 10 to 14.

Q In your experience teaching did you teach Spanish languages only?

A For most of the ten years I taught Spanish but for a brief period when I initially began my career I did teach French as well.

Q Were you head of the department at the age of 26?

A Between 26 and 27, yes.

Q You headed the department?

A That's right.

Q How many teachers if you can recall were under your supervision?

A I believe I stated that there were about 18.

Q Are you married or single?

A I am single.

Q When you were in Philadelphia had you lived with your parents?

A Yes, I did live with my parents when I was in Philadelphia.

Q Do you hold other than teaching licenses, any other professional license?

A None other than the certification I have as a referee with the NCAA and the United States Soccer Football Association.

Q Were you planning at this time, Mr. Kelner, to secure a position with the school system sometime in the future?

A Yes, I have applied -- I guess you are referring to an application I've made to the school district of New York. I am seeking certification in New York State and I have applied, I've taken the written exams, I've passed as well the substitute oral exams, and I'm expecting or hoping for a notification that I have been certified in the near future.

eorf a pm 1 Kelner-direct

Q By the way, Mr. Kelner, have you ever been a direct of a camp?

A Yes, I have.

Q Can you tell the Court the name of the camp?

A Yes, in 1971 in the summer I was the director of the Jewish Defense League Camp in Woodburn, New York.

Q The name of that camp?

A It was called Camp JDL after JDL.

Q Your responsibilities in that particular camp?

A My responsibilities at the camp were to coordinate and direct and oversee the scheduling of training and the performance of the staff and also the management of the routine daily matters like kitchen provisions and maintenance of the physical plant.

Q By the way, Mr. Kelner, have you ever been convicted of a crime to this date?

A Not at all. I will say that I did pay a $25 fine a few years ago in New York stemming from a demonstration in which we blocked traffic for a brief moment and a number of people were arrested. I paid a $25 fine for that which was merely a minimal violation equal to that of a traffic ticket basically.

MR. DECHTER: Could I have the arrest record?

Q I refer you to December 24th -- sorry, withdrawn.

May 13, 1971; do you recall an arrest made by federal authorities regarding firearms? Was there such an arrest?

A I remember members of the AT&F, the Alcohol, Tobacco and Firearms coming in and pushing my parents aside.

Q And what happened?

A I was arrested.

Q What was the disposition of that arrest?

A All charges against me were dismissed by Judge Weinstein in the Eastern District of New York.

Q Do you recall December 24, 1971 in Philadelphia regarding a breach of peace? Was there such an arrest?

A I had several such arrests stemming from demonstrations in both the Jewish Defense League in New York and Philadelphia. To be truthful, I don't recall that one specifically. These arrests came out of demonstrations or other activities of the JDL to bring to public view certain issues that were of concern, certain issues of injustice or human suffering that required action by either organizations in the Jewish community or established agencies of the Government. Because no action was being taken by the established agencies, the JDL was involved in bringing these issues to the public.

Occasionally, since there was very close surveillan by police or agents, federal agents, on our activities, there were arrests. Some of these were preventative arrests, perhaps, to prevent clashes or confrontations.

This to which you are alluding is probably one of the many on which I was arrested which were of that nature.

Q Mr. Kelner, were you ever convicted of those crimes which the U.S. Attorney mentioned, I won't go through each one. Were you convicted of those crimes?

A Absolutely not.

Q Do you recall November 7, 1973, New York City, charged with possession of a dangerous weapon?

A Yes, I do.

Q What was the disposition of that case?

A The case was, as far as I know, the record even says that there was no arraignment on that particular matter.

Q You weren't even arraigned in court.

A I read the sheet myself. It came from Albany. There was no arraignment. The carge was dismissed. That which I had in my hand happened to be a rubber tube which I was carrying, the day you are referring to, 1973, is that correct?

Q Right.

A Was the day of the outbreak of the Yom Kippur

War when the war in the Middle East started in October, I guess it was, '73.

There was a confrontation in front of the Israeli Consulate at 800 Second Avenue. There was a large group of Arab students or Arab citizens of New York or perhaps some who were not citizens that had come out to demonstrate at the Israeli Consulate as the war broke out.

Myself and others went on the scene and went there for the sole purpose of making sure that there was no damage to be done to the Israeli Consulate.

I was arrested on the scene, as I have explained before, perhaps because the police thought there might be some sort of a clash. There was no conviction, there was no arraignment even on that case.

Q So that many of your cases it never even came to court, isn't that so?

A That is absolutely correct.

Q Have I personally represented you in one or two arrests where there was no conviction?

MR. BUCHWALD: Objection.

THE COURT: Yes, sustained as to form.

Q Were you arrested at Temple Emanuel on some charge? Will you tell the Court what that was about?

A Yes, incidentally that case is still pending

in New York. Myself and Rabbi Maier Kahane, the head of JDL and about six other people, mostly people in the early 20s, went to Temple Emanuel on an afternoon of I guess it was February at about --

Q February 10th.

A February 10th and we sat down in the main sanctuary of the temple. We were the only ones in the main sanctuary. The santuary of Temple Emanuel happens to be very large, it is enormous, it is one of the largest temples I have seen in America.

We sat down and we were reading from the scriptures and Rabbi Kahane was lecturing to the six or seven or us who were there. One reason we went there was to call attention to the fact that the reform rabbinate, the reform rabbis of America were silent and inactive on the matters of the Middle East.

We in JDL under Rabbi Kahane's leadership were very concerned with the tendency in the Middle East and the tendency of the American foreign policy to put Israel under pressure to give up its territories putting Israel in a position where its future, its existence would be jeopardized.

We feel that there should be an outcry by the rabbies throughout America and in order to bring

eorf 6 Kelner-direct

our feeling, our belief to the public, we went into Temple Emanuel with no intention of causing any disruption at all.

We sat and we prayed in the main santuary. Members of the temple who obviously don't share the views that we have came in and told us that if we didn't leave by 5:00 o'clock when the temple supposedly closes that we would be arrested.

We explained to them why we were there. We explained we wanted to remain the entire evening peacefully, this type of activity, you will recall, has been done many times in the past by non-Jewish groups throughout the country. I even recall recently a group of American Indians --

MR. BUCHWALD: Objection.

THE COURT: Sustained.

A What we did was of really no consequence to the temple at all, but they unfortunately did not agree to our staying there even peacefully and the police were summoned and we were put under arrest for trespassing and that is the entire case.

It is still pending down the street in 100 Centre Street.

Q Mr. Kelner, have you committed a violent act?

eorf 7 Kelner-direct

A I don't recall any.

Q Again I ask you whether to this date there has ever been one solitary conviction since you have been 16 years old?

A None other than that $25 fine that I mentioned to you previously.

Q Mr. Kelner, I show you --

MR. DECHTER: May I have Government's Exhibit 2?

Q I show you Government Exhibit 2, the second paragraph. Are you familiar with the statements on that exhibit?

A Well, I have seen this exhibit within the last couple of days here in court.

Q Would you read it, please, to the Court?

A Yes, this is apparently the United Press International wire of November 11, 1974 which states:

"The Jewish Defense League --"

Q Louder.

A "The Jewish Defense League holds news conference to allege threats have been made against JDL by Palestine Liberation Organization, 1133 Broadway at 26th Street, Room 1026, 8:00 p.m.

Q That means -- are you saying there that the Jewish Defense League was threatened by the PLO?

corf 8 Kelner-direct

MR. BUCHWALD: Objection.

THE COURT: Sustained. The exhibit speaks for itself.

Q Did you hold a news conference that day?

A Yes, we did.

Q What was the purpose for the news conference?

A The purpose of the new conference as it states in the UPI wire and the UPI wire was indeed put out, printed as a result of a call from the office of the Jewish Defense League.

The purpose of the news conference was to respond to threats that we indeed received from alleged members of the Palestine Liberation Organization.

Q Was that on November 11, 1974?

A As stated, yes.

Q Do you know who made that call?

A I do not recall specifically who made it, but it was more than likely someone in our office. I do recall that calls were made to invite the press to our offices.

Q Did you personally make any call asking anyone to come to the JDL office that day?

A I don't recall making the phone calls myself. Normally I do not.

We have staff personnel, secretaries and volunteers

who handle that chore.

Q Let me ask you this:

Were you receiving calls from the different media, TV and so forth, weeks in advance regarding the pending Arafat visit?

A Yes, indeed, for I don't know how many weeks, we had been receiving calls virtually daily. Not only from agencies of the media here in America, but also from abroad. We received inquiries by phone as to what plans the JDL had for responding or reacting to the outrageous visit of Yasir Arafat to the United Nations.

Q What was your response? Did you personally have any response?

A Where?

Q In regard to these calls prior to November 11th.

A As I recall, we had told --

Q I am sorry if I didn't make it clear. I asked if you personally responded.

A At times, yes.

Q You know essentially what you said at that time?

A I recall that I had told the reporters or editors who had called us that we would continue demonstrating at the Waldorf-Astoria Hotel. Of course this was specifically only when it was publicly announced that the Waldorf

would be used as a lodging for Arafat, I think that was only a few days before his arrival, that we would be demonstrating at the UN and that of course, in addition, explained our outrage and shock at the unusual precedent by the United Nations and America for allowing such a man into the country.

Q Did you or any of your associates involve yourselves in demonstrations in New York City?

A Yes, there were a number of demonstrations.

Q In and about let's say within a month before Arafat visit, November 11th?

A There were demonstrations near the UN.

Q How would you describe those kind of demonstrations?

A They were basically peaceful demonstrations, sign carrying demonstrations, but loud with chanting of slogans.

Q Do you recall some of the slogans?

A Well, slogans like there is no Palestine and no, no, PLO and Israel must live.

Q Let me ask you this, Mr. Kelner:

Are you aware that groups like NAACP, Core, Vietnamese Day Parade, peace groups, are you aware of the fact that they hold demonstrations, Weathermen,

do they hold demonstrations in New York?

A I believe they do.

Q Were you aware of some of their demonstrations?

A I think there were some at that time also.

Q Do you know whether there were slogans in their demonstrations?

MR. BUCKWALD: Objection.

THE COURT: Sustained.

Q Mr. Kelner, I want you to think about this for a second and think carefully and honestly.

Did you utter a threat to one Yasir Arafat?

A I did utter something that sounded like a threat, but it was not a threat.

Q Did you make any statement at that time?

A The statement that I made on WPIX television was one that on the surface appeared like a threat. But the fact of the matter is we in JDL knew that with the security precautions, the unprecedented security cautions in New York City carried out by the New York Police Force and federal authorities, it was impossible to reach Mr. Arafat. It was utterly impossible and if we had planned to actually carry out such a thing, it is very unlikely that we would have brought it to television in advance.

Q Did you have any intention to harm one Yasir Arafat?

A I have very strong feelings about Yasir Arafat, very similar to the feelings that I have about Adolph Hitler and I can't say what I would do if I were to face him face to face on the street and I am sure that many people in this court and many people in New York might lose control of themselves if they were to meet him.

We had no plans, neither I nor Jewish Defense League at that time to carry out an assassination because we knew that it would be impossible. It would be futile.

Q Again, would you characterize your actions as one of threats?

A No, I would not.

Q Let us go back to about 8:00 p.m. in the JDL office. Were you there that day?

A I believe so, November 11, 1974.

Q I don't hear you, sir.

A Yes, November 11, '74, 8 p.m.

Q Did there come a time when a number of reporters and media people came to your office?

A Yes, indeed.

Q How many?

A Well, so many that our office, as Mr. Miller previously described as being 10 foot by 10 foot, there was no room to move in the office. The office was packed with reporters who were practically frothing from the mouth, they were so hungry for a story.

Q You mean they were badgering you?

A They came seeking a story that they would use to sell papers and broadcasts.

Q Were they looking for sensational news?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q How would you describe the kind of questions asked that day of you?

A The questions were leading questions, basically. Incidentally, there were many questions that were asked that were not brought to the attention of the jurors because many of the tapes of that press conference were not presented here in court.

There were tapes, as Mr. Miller said, that were running before he began to interview me.

The discussion centered mainly and principally around the threats that the JDL received from PLO in New York.

I will bring to your recollection an incident that occurred a few weeks before this PI, some time in October, when one official of the Palestine terrorist organization on Park Avenue, where they have an office, was assaulted and was removed to a hospital.

At that time it was alleged by the PLO in New York, and perhaps by the news media, that the JDL may have had something to do with that, which we did not, and we had been receiving threats ever since that incident, we received threats in our offices by way of telephone, and the press conference on November 11th was called as the wire says, the UPI wire, for the purpose of responding to and discussing those threats from PLO, to express the fact that we in JDL, who present an image of a new Jew that does not sit back waiting to be attacked, waiting to be assaulted or waiting to be taken to the ovens, that we will not sit idly by, that we will defend ourselves.

Q So that actually you were responding per-

sonally to a threat that may have been to your life?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Did you believe that there was a possibility that a PLO member or a group of any sort could harm you?

A Of course.

MR. BUCHWALD: Objection to the leading nature of the question.

THE COURT: Yes, sustained. Strike out the answer.

Q Did it ever occur to you in the sensitive position that you held as an office manager the possibility of what could happen?

A I was very cautious, yes.

Q Did you have security measures taken in that office?

A That is right. As Mr. Miller described, we maintained young men, who are trained in self-defense, in karate and such arts, who were posted in the hall outside our office and in the lobby downstairs constantly.

Q When the reporters came they were escorted inside the office?

A I believe so.

Q Was there a great deal of noise and talking going on while you were in that same room?

A Yes, there was.

Q Was there confusion?

A Well, I wouldn't call it confusion, but there was a definite uneasy situation. Every reporter, it seemed, wanted to get his own story, wanted to ask his own questions and wanted to get the answers before any other reporter would.

Q Are you saying that maybe two or three reporters were asking you questions at the same time?

A Absolutely.

Q Did you always hear every question of each reporter?

A I did, yes.

Q Did one hinge on the other or did they each one separately interview you?

A Well, it was sort of at random. I would answer one question of one reporter and prancing to another one and then another, trying to satisfy all of them.

Q If you gave them an answer that you think you would want to have a study group set up to go into the

root causes of the PLO, would that have satisfied the reporters?

MR. BUCHWALD: Objection.

A Very unlikely.

THE COURT: Sustained. Strike the answer.

Q The fact that you spoke that day, were these in response to inflammatory statements asked of you?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Could you recall one or two of the questions asked by one of the reporters or any of the reporters?

A Yes, they asked regarding the threats we received from PLO, from whom we had received them and by what medium, and they asked what our response would be to those threats.

Midway in the press conference the questions started to deal with Yasir Arafat himself, and by the nature of the questions coming from the reporters it was very obvious that they wanted an outrageous or sensational response from JDL as to in what way JDL would deal with Yasir Arafat.

Q Therefore, you supplied them with that kind of answer, is that so?

A Well, having dealt with the press a number

of times in JDL, you know that if you want to maintain a good relationship with the press you have to give thm what they are looking for and I then began to realize what they were looking for and that is the film that we saw here today.

Q And therefore you made outrageous statements?

A Yes, indeed.

Q Would you characterize them as being bombastic or overexaggerated?

A They were from the heart. However, I guess since -- what can I say? I won't say they were exaggerated. I don't know what I would have done, as I said before, if I had met Yasir Arafat face to face, but there was no plan as the film alleges there was.

Q Well, then, you believe that any individual, Jewish or not, would have reacted in a most direct way to one Yasir Arafat, who is an out and out murderer, is that right?

MR. BUCHWALD: Objection to the form of the question.

THE COURT: Sustained.

Q Let me ask you, Mr. Kelner: Are you aware of

the fact that Yasir Arafat is responsible for the murder of an American ambassador in Khartoum, are you aware of that?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Are you aware of the fact that Yasir Arafat --

MR. BUCHWALD: Your Honor, the same objection.

THE COURT: Yes, sustained.

MR. DECHTER: Your Honor, I have not had an opportunity to state what I am going to ask before the question is immediately objected to.

THE COURT: Mr. Buchwald has an anticipation and I will hear you at the side bar.

(At the side bar.)

THE COURT: Read me back that last question and answer.

(Record read.)

THE COURT: Is this going to be more of the same? Is that where you are going?

Just tell me.

MR. DECHTER: Yes. One of the things that have to be brought out is the ongoing situation, the circumstances regarding what provoked a man to

make statements and I would not go through every one of his crimes because it would take me years to do that.

THE COURT: I sustain the objection to that.

MR. DECHTER: Your Honor, I respectfully ask that when counsel -- I must put this on the record -- when the U. S. attorney, in making remarks, every time I would attempt to interfere with that remark by making an objection, your Honor did not allow that.

Immediately when I tried to ask a question, even without knowing what I was going to say, I could have said anything --

THE COURT: But I anticipated what you were going to say and you confirmed that my anticipation was correct.

MR. DECHTER: I anticipated what this gentleman was going to say, but it doesn't happen the other way around.

I would request a little impartiality.

THE COURT: I trust you are receiving it.

MR. DECHTER: Thank you.

(In open court.)

THE COURT: How much longer do you anticipate being.

I instruct you again, ladies and gentlemen, it is only the answers to the questions that are evidence and not the quesions themselves to which there was no answer or to which the answer was stricken out.

Go ahead.

BY MR. DECHTER:

Q That day, November 21, 1974, with reporters all on top of you asking the questions that they did in rapid fire, how did you feel at that particular time?

MR. BUCHWALD: Objection as to the form of the question, the leading nature.

THE COURT: Sustained as to form.

Q Let me ask you again.

What was your own personal feeling when these questions were asked, the frame of mind you were in at that time?

A Before the reporters even came I had been very uneasy, very upset and frustrated with the arrival or the imminent arrival of Yasir Arafat and at the time they came I knew that it was upon my shoulders, perhaps more on my shoulders than on the shoulders of any other

Jew in America, to express the viewpoint of a concerned Jew toward the arrival of Arafat.

Q It is a question of belief. What was your belief, Mr.Kelner?

A My belief was that it was very unjust to allow the head of a terrorist organization that has killed children to come into the United States without any indictment of him whatsoever.

Q Were you expressing those beliefs during the filming of that episode that we saw in court today?

A If I had expressed those beliefs per se, it may have been somewhat redundant because they were expressed by many Jews in the community.

I felt that anger had to be shown at this time.

Q You were angry, is that true?

A That is correct.

Q Were you frustrated?

A I was frustrated because I knew that Arafat was so protected that there were people in the streets in Brooklyn and other parts of Manhattan that were not protected as he was.

Q What did you want to demonstrate by your remarks?

A Merely outrage, nothing else, and merely the fact that there are Jews who no longer sit back and are led like lambs to the oven.

Q What would you do?

A I don't understand the question.

Q What would you do other than what you said? Did you have any such intention to do anything?

A At that particular moment none at all.

Q Did you have intentions the day before?

A None at all except to conduct demonstrations on the streets as we had been doing.

Q When you say a new Jew, are you referring to the Jew who goes out and demonstrates only in the street and speaks out within his rights of free speech?

A Yes, exactly.

MR. BUCHWALD: Objection, your Honor.

THE COURT: Yes, sustained. Strike the answer.

Q You weren't referring to a threat of violence, were you?

A Referring to it?

Q Yes, in the statement that was there, did you threaten?

A As I said before, the words were the words of a threat, but at that particular time there was no followup being planned at all.

Q Did you express your indignation?

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Your horror?

A Yes.

Q Did you say it in a strong and emotional tone?

MR. BUCHWALD: May we have Mr. Kelner testify and not Mr. Dechter?

THE COURT: Yes. Objection sustained.

Q Could you describe the state of your mind as far as the questions went at that time when you answered them?

A I was very confused, as I have said. I think I have already answered that question.

Q Most important was whether you had any intent to do anything other than what you stated?

A I think I have answered that question.

Q Let me ask you this:

The fact that a picture was shown wearing uniforms and so forth, was that part of a whole kind of,

you could say, a stage?

A Well, there were references made earlier in this trial to a firearm being on the desk as well. There were a number of things in the movie and in the one black-and-white photograph which was an exhibit which were positioned and placed in the office for the arrival of the press to create an image, to create an appearance and to create an understanding of our feeling.

This is why the scene was as it was.

Q That day people were in that office and you were just responding to questions, isn't that so?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Questions were asked and you answered them?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

MR. DECHTER: Could I please be told the reason for the objection and the ruling?

THE COURT: Yes. The form.

Q Were certain questions asked of you, sir? Were certain questions asked of you?

A Yes.

Q And you answered them, as a matter of speech?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q By the way, were you aware of the tremendous security in New York City at that time?

A Yes, I was.

Q The fact that Mr. Arafat was at the Waldorf-Astoria, were you aware that he was at the Waldorf, was this something that was in the news at that time?

A I had heard reports of that, yes.

Q Was it your intention to go over to the Waldorf at all?

A As a matter of fact, I don't think he was present at the Waldorf that particular day.

MR. DECHTER: Thank you very much, Mr. Kelner.

THE COURT: Now, ladies and gentlemen, we will be in recess until 10:30 in the morning. Continue to heed my admonition to you to keep an open mind and not discuss this case amongst each other or with anyone else.

Do not read anything about it in the public press, listen to it if anything regarding this case

should be on television or radio.

As I said, you are to decide this case only on what you hear in this room and on the instructions of the law that I will give you so do not pay any attention to any outside reports of this should they come to your attention.

See you in the morning. Good night.

The people will please remain in the courtroom until the jury has cleared the floor.

(The jury left the courtroom.)

(Adjourned to June 13, 1975, at 10:30 a.m.)

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United States of America

vs 75 Cr. 200

Russell Kelner

New York, New York
June 13, 1975 - 10:00 a.m.

(Trial resumed.)

(In open court, jury present.)

THE COURT: Good morning.

Go ahead, Mr. Buchwald, please.

Mr. Kelner, would you resume the stand, please?

R U S S E L L K E L N E R, resumed the stand, having been previously duly affirmed, and testified further as follows:

MR. DECHTER: Your Honor, I am sorry, could we have a side bar?

(At the side bar.)

MR. DECHTER: I respectfully ask the Court to give me permission to ask a few more questions of Mr. Kelner. I think it is important. I have one or two more questions and that will be it.

At the same time any cross examination by Mr. Buchwald that he should not, he should be instructed and he should not and has no right to go into any prior arrests. He can only go into convictions of this man.

THE COURT: I am sure he is aware of that as a matter of cross examination.

MR. DECHTER: Would you give me five minutes?

THE COURT: Do you have any objection to further questions?

MR. BUCHWALD: No, your Honor.

THE COURT: Go ahead.

(In open court.)

THE CLERK: Mr. Kelner, you are still affirmed.

FURTHER DIRECT EXAMINATION

BY MR. DECHTER:

Q Mr. Kelner, I ask you at this time, and you have time to consider it for a second, whether what you said in any way was a communication of a threat?

MR. BUCHWALD: Objection.

THE COURT: Yes, sustained.

Q Would you tell the Court what you were trying to convey?

A What I was trying to convey with regard to what was --

Q Said.

A Shown on WPIX or the entire press conference?

Q The entire press conference.

A What we were trying to convey in the press

conference was merely what we had told the press upon calling them to our offices as was indicated in the United Press International wire that we felt that we had to respond to the threats that we had received from alleged memorandums of the PLO by telephone, a matter which was under investigation by the New York Police Department.

This is a matter of record. We felt that we had to tell the public that we were ready as Jews who were not going to be pushed around by any terrorist organization that kills wilfully and indiscriminately and that we would defend ourselves and protect ourselves and that they would not be able to accomplish anything in accordance with their threats.

As we outlined yesterday, the press conference proceeded beyond that because the reporters were looking for more than such information and they resumed questioning seeking whether we would take some action against Yasir Arafat.

Q Were you going to take any action against Yasir Arafat?

A No, we were not.

Q Was there any intention on your part?

A None at all.

MR. DECHTER: No further questions.

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MR. BUCHWALD:

MR. DECHTER: Your Honor, can I get a glass of water? Is there a glass available?

(Pause.)

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: You may proceed, yes.

Q Mr. Kelner, you are the operations officer of the JDL?

A Yes, basically the office manager.

Q Well, do you call yourself the office manager or the operations officer or both?

A Well, my main function is that of office manager, but sometimes for purposes of public relations it sounds better in an organization of our type to use the title of operations officer.

Q Where are you in the hierarchy of the JDL?

A In the JDL hierarchy I am below Rabbi Meir Kahane who is international chairman and below I guess two other officers in the organization.

Q It is a relatively high position within the organization?

A That is a matter of opinion, I guess.

Q Is that a fact which you keep secret?

A No, not at all.

Q It was well publicized back in November of 1974, isn't that true?

A I beg your pardon?

MR. DECHTER: Objection, your Honor. The question was answered.

THE COURT: Overruled.

Q You didn't keep secret the fact in November of 1974 that you held a relatively responsible high position with JDL?

MR. DECHTER: I object to the fact of November '74. What day are we talking about?

THE COURT: Overruled.

A I believe you said -- you were asking whether or not I kept it secret.

Q You didn't keep it secret?

A No, of course not.

Q I believe you indicated that in the days and weeks preceding the scheduled appearance of Arafat in New York, but following the announcement by the UN that he was coming, that you observed and participated yourself in a number of demonstrations protesting --

MR. DECHTER: Objection to conclusions made by the counsel.

THE COURT: Overruled.

Q You observed and you yourself participated in a number of demonstrations --

MR. DECHTER: Objection,your Honor. This is obviously way beyond the scope of direct.

THE COURT: Overruled.

Q Am I correct, sir, that in the period between Mr. Arafat's invitation to speak at the UN and the time that he arrived that you participated in a number of protests and demonstrations together with many others protesting Mr. Arafat's coming to the United States?

A That is, of course, true. We were very concerned with the situation.

Q You felt strongly and you disagreed with Mr. Arafat?

MR. DECHTER: Your Honor, I didn't hear the answer of Mr. Kelner.

MR. BUCHWALD: The answer was yes.

THE COURT: Read it back.

(Record read.)

Q Not only JDL, but a number of people were concerned, isn't that true?

A I think people all over the world were concerned, the fact that a man responsible --

THE COURT: Mr. Kelner, just answer the question responsively, please. Would you read the question again.

(Question read.)

A Of course.

Q And where were many demonstrations in New York City opposing Mr. Arafat and the PLO and things that they stood feor, isn't that true?

A All over the world.

Q You saw some of these demonstrations, you participated in some of these demonstrations?

A That's right.

Q People carried placards during these demonstrations?

A That's right.

Q They changed slogans during these demonstrations?

A Correct.

Q Even on November 11th there was a demonstration in front of the Waldorf, was there not?

Q And people carried placards and changed slogans?

A They were expressing their anger.

Q Expressing their opinions?

A That's right.

Q As is their right?

A That is correct.

Q Because the PLO isn't immune from people saying what they think about it?

A The people there were outraged just as I was.

Q Did you yourself participate in the Waldorf demonstration?

MR. DECHTER: Objection, your Honor. Irrelevant.

THE COURT: Overruled.

A I wasn't there myself because we had quite a number of office matters that I had to attend to, as we usually do.

Q To your knowledge, were there JDL representatives who participated in that demonstration?

MR. DECHTER: Objection, conclusion.

THE COURT: Overruled.

A I recall that there were.

Q And that was a planned but peaceful demondtration, was it not?

A I believe so, yes.

Q The press conference itself on November 11th, was the UPI originally contacted by someone at JDL, to your knowledge?

A I don't recall specifically, but it is possible. It is likely.

Q You knew prior to the time that the press arrived that there was going to be a press conference?

A That is correct.

Q It may not have been you yourself who called UPI, but there are secretaries there who at your request had let the press know that you were having a press conference?

MR. DECHTER: Objection. It is a matter of his mind as to whether he knew.

THE COURT: May I have the question read back, please.

(Question read.)

THE COURT: Overruled.

Q Isn't that correct?

A That is a matter of routine procedure in the Jewish Defense League office.

Q When, approximately, if you know, was -- withdrawn.

Was it just UPI that was notified in the routine procedure?

A Normally when the media are called perhaps there are 15 agencies that are telephoned.

Q Those include radio and television stations, newspapers?

A Yes.

MR. DECHTER: Objection, your Honor. What time are we talking about and under what conditions. Can he specify? Would the U. S. attorney be good enough to specify exactly what hour he is referring to, your Honor?

THE COURT: Overruled.

Q It is a routine practice --

MR. DECHTER: Objection to what the routine practices are. We are talking about a case that has to do with November 11th, your Honor.

THE COURT: Overruled.

MR. BUCHWALD: May we have the last question read?

(Question read.)

Q Do you know when in relation to 8 o'clock

when the press conference was actually held, the media, UPI and the others, were initially called on November 11th?

A No, I don't recall.

Q But for at least a few hours before the press conference you knew that there was going to be a press conference?

A There wasn't much time. As I recall, we served notice from our executive director telling us to call a press conference to respond to the threats we received from the PLO and I don't know exactly what time. It was late, I recall.

Q It was at least some time before UPI found out that there would be a press conference?

A Possibly.

Q Now, who was responsible for overseeing the arrangements that were being made for holding the press conference itself, if you know?

A Well, there are a number of people who normally do that and in this particular instance it was the security chief of the Jewish Defense League.

MR. DECHTER: Your Honor, maybe I can be helpful to the court. It seems to me I have some knowledge as to the specifics regarding the questions

asked and I want to be helpful --

THE COURT: No, let Mr. Buchwald proceed with his own examination in his own way. Thank you very much.

MR. DECHTER: Thank you. Sorry, your Honor.

Q Mr. Kelner, do you know who was responsible for the arrangements, who had overall charge of making sure that everybody was in the right place?

A Yes, in that particular instance it was the security chief of the Jewish Defense League.

Q Who was that?

A His name is Kravat.

Q How long before the press conference were you in the room that was depicted in the film?

A I believe the entire day.

THE COURT: Ladies and gentlemen of the jury, I am going to excuse you from the courtroom for a minute.

If you will, take the jury out, please.

(The jury left the courtroom.)

THE COURT: Could I please have identified on the record the names of these two ladies seated in the front row next to the aisle?

Please speak up a little louder, if you will.

VOICE: Sheila Lidz.

THE COURT: The other lady's name?

VOICE: Carol Gitlin.

THE COURT: During the last three or four questions, either because you disagree with what the witness is saying or he is making a mistake, according to your belief or for some other reason, you have been violently shaking your heads in disagreement with answers as you hear them. I don't want to see any more of that.

All right, you may sit down and we will bring the jury back.

MR. DECHTER: Your Honor, can I have an opportunity to eat this chocolate. I didn't have any breakfast.

THE COURT: You can go right ahead.

MR. DECHTER: I didn't want to disturb the court.

THE COURT: I take it that the two ladies I have spoken to have some connection with the defendant because I have seen them hand up notes to you as counsel, Mr. Dechter, during the course of the proceeding. Am I correct about that?

MR. DECHTER: That is correct.

THE COURT: Very good.

MR. DECHTER: Your Honor, there is no reflection at all on either myself or Mr. Kelner.

THE COURT: I am not making any such. I am just preserving the fact that this case is going to be tried with the witness on the witness stand and the exhibits received in evidence.

MR. DECHTER: I am sure it was just an emotional kind of thing.

THE COURT: That may be. I am not saying anything more than I said.

(Jury present.)

BY MR. BUCHWALD:

Q Let me show you the photograph which is Government's Exhibit 3 (handing).

Do you personally know what kind of gun it is that is depicted on the desk there?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

MR. DECHTER: Absolutely irrelevant. There is no such charge.

THE COURT: Overruled.

A Yes. I believe I know what it was, but, to my knowledge, I believe it was not a gun per se because of the fact it was inoperative.

Q Was it loaded?

A No. It was not.

Q Do you know what --

A The gun could not be fired.

Q Do you know what kind of weapon it is?

A A .38 caliber gun, police-special-type revolver.

Q Do you know whose holster that is?

A My own.

Q Do you know who put the gun on the desk?

A I put it there myself.

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

Q Was it on the desk when you started the conference?

A I believe so, yes.

Q Isn't it a fact that it was put there so that it would be there during the conference?

MR. DECHTER: I object. These questions have been asked and answered and they are argumentative.

THE COURT: Overruled.

A The gun was put there for effect, for the entire psychological effect, of the picture that would be shown in the newspapers.

Q You wanted to create a certain appearance?

A We wanted to create an appearance of Jews who are angry, who are tired of seeing children murdered, of bloodshed in Olympic competitions and apartment houses.

Q You wanted to appear to be serious?

MR. DECHTER: Objection.

THE COURT: Overruled.

Q You wanted to appear to be serious?

A We wanted to appear to be a new type of Jew.

MR. DECHTER: Objection.

THE COURT: I permitted the witness to answer as responsively as he wanted. I want the assistant to have his question answered.

A Seriously concerned and upset, I was, yes.

Q Did you want what you said to appear to be serious?

A That's right, seriously concerned, as I said.

Q You didn't want it to appear to be a joke?

MR. DECHTER: Objection.

THE COURT: Overruled.

Q Isn't that a fact? You didn't want it to appear to be a joke?

A We don't joke when we are dealing with assassins.

Q You didn't want the New York City Police Department or the FBI or the Secret Service to think it was a joke?

A We were not communicating with the FBI and the Police Department and the Secret Service.

Q Did you want them to think it was a joke?

A I didn't want them to think anything.

Q Did you want the television audience to think it was a joke?

A The television audience is the one that --

THE COURT: Answer that yes or no. It's capable of a yes or no answer.

A We were concerned. We wanted the people to know we were seriously concerned and upset over what was going on.

MR. BUCHWALD: Can we have the last question reread.

THE COURT: Answer the question yes or no.

(Question read.)

A Of course not a joke.

Q Did you want them to think you didn't mean what you said?

A The audience would interpret using their own interpretation.

Q What was your desire? Did you want them to think that you meant what you said.

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A As I said at that particular moment I was satisfying the reporters. I knew that the reporters wanted sensationalism.

MR. BUCHWALD: May I have that stricken as unresponsive.

MR. DECHTER: That is responsive.

MR. BUCHWALD: May we have my question reread?

(Question read.)

A To an extent, yes.

Q Did you want any members of the PLO delegation who observed the telecast to think that you meant what you said?

MR. DECHTER: Objection to what the defendant at this time thought, the operation of his mind; I think that's much further than the United States attorney has a right to go into.

THE COURT: The objection is overruled.

(Question read.)

A I was not thinking of the PLO at that time. We were thinking of the Yasir Arafat in town and I didn't expect him to watch any television or read any newspaper. I was not communicating with him at all.

Q Did you want the members of the media --

MR. DECHTER: Those questions have been asked and answered time and time again.

THE COURT: Mr. Dechter, the defendant on direct examination stated what he intended. I am permitting cross examination on that subject. The

objection is overruled.

MR. DECHTER: May I make a statement regarding the fact that the --

MR. BUCHWALD: I object, your Honor.

THE COURT: The objection is overruled. Sit down.

MR. DECHTER: At the same time --

THE COURT: Take your seat. The objection is overruled. I don't want speeches.

MR. DECHTER: May I have an opportunity to state what I have to say as a lawyer?

THE COURT: Go ahead.

Q Am I correct, sir, that in placing the gun on the table prior to the press conference so that it would be there during the press conference you wanted to enhance the seriousness of what you said?

A That's not correct. We wanted to present an image of a Jew who would not just be pushed around, that would not be slaughtered in apartment houses and hotels.

Q Did you want to negate any possibility that what you said would be interpreted as a joke?

MR. DECHTER: Objection. These same questions have been asked and answered.

THE COURT: Overruled.

A There was nothing negated. What would be believed would be believed. It was what the media wanted to hear.

Q What did you want to be believed?

A I just wanted the media to be satisfied that they had a story to print in their newspapers.

Q You didn't care what people thought of what you said?

A I wanted --

MR. DECHTER: Objection to the form of the question.

THE COURT: Overruled.

A I wanted people, the public, everyone, to believe that we could not tolerate any longer what we have been tolerating from a nazi-like organization.

Q You wanted to make sure that the meaning would be clear that you were not a group that would be attacked first?

A Of course.

Q You knew that your words sounded like --

MR. DECHTER: Objection to the "words sounded."

THE COURT: Overruled.

Q You knew your words sounded like a threat?

A Whoever would be listening, perhaps it did.

Q You yourself in your direct testimony yesterday, the words sounded like a threat?

A It did have the ring of a threat, yes.

Q It appeared like a threat. You knew that?

A Apparently it did.

Q Not apparently. What did you think? Did it appear like a threat when you made the statement?

A I personally feel I don't look like a threatening person. I don't look like a person who would kill anybody. It was a matter of interpretation.

Q With the gun on the desk in front of you do you look more or less threatening?

MR. DECHTER: Objection.

THE COURT: Overruled.

A I would not know, counsel. I would not know.

Q They were the words of a threat, were they not, whether or not you intended to carry it out? They were the words of a threat, were they not?

A They sounded like a threat apparently.

Q Incidentally, when Mr. Miller on WPIX was interviewing you, what we saw there on the screen, were there other reporters talking to you at the same time?

A There were several.

Q While Mr. Miller was interviewing you?

A I believe so, yes.

Q Do you have a distinct and clear recollection of that?

A Not distinct and clear but I know there were several people talking to me at the same time.

pgrf 2 Kelner-cross

Q As Mr. Miller?

A I believe so, yes.

Q Is that your desk generally?

A No, it is not.

Q Is that the office out of which you work?

A That is our office, yes.

Q In calling the press conference, isn't it a fact that it was your desire that TV and radio people attend?

A I didn't call the press conference myself, counselor.

Q In having it called, weren't you desirous of having radio and TV people attend?

MR. DECHTER: Objection --

THE COURT: Overruled.

MR. DECHTER: -- to the characterization by the U.S. Attorney.

THE COURT: Overruled.

A The organization was desirous of having a press conference, yes.

Q Were you desirous?

A I felt that we had to respond. I agreed that we had to respond to the threats we had received from the PLO.

Q You wanted as much coverage as possible.

MR. DECHTER: Objection. This has been asked and

pgrf 3 Kelner-cross

answered time and time again.

THE COURT: Overruled.

A We seek coverage on all newscasts.

Q Including television?

A Television is normally considered part of the media, yes.

Q The best kind of coverage from your standpoint?

A Not necessarily so. It depends. In this particular instance apparently it was not because WPIX obviously cut out a major part of the press conference. They came late. They began rolling their cameras late. They didn't get what we were originally discussing, the threat of PLO against us. This didn't prove to be a worthy press conference at all with regard to that station.

Q Did you want your statements to be telecast on television?

A The statements of our response to the PLO's threat, we wanted them disseminated to the media no matter what way.

Q As you spoke into that camera and into that WPIX microphone and uttered the words that appeared on this screen, you did not want those words to appear on WPIX television, is that it?

A Not alone without the rest of the press conference.

Q Did you want those words to appear?

A In context with everything else, yes.

Q In attempting to have your meeting taken as seriously as possible, is it fair to say that among other things you wanted to discourage Arafat from just walking along the streets of New York City?

A I didn't think I had such power. I really did not.

Q You didn't care how long he stayed in the United States?

A Of course I cared. I was concerned that the United States ignored what his organization had condoned, the assassination of the Ambassador in Khartoum.

Q Did you want to limit the amount of time he spent in the United States?

A Not at all.

Q You didn't care?

A Counselor, I didn't have the power to do such a thing.

Q It is not a question of power. Did you want to do that?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: I'm sure that millions of Jews wanted to do that.

Pgrf 5 Kelner-cross

THE COURT: No, no. That was not the question.

Q Did you want to do that?

A Of course. Like any other Jew in the United States in the world.

Q You wanted to limit his ability to move around while he was here?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A How could I do that? The question seems to be hypothetical. I really don't understand it.

THE COURT: Read the question.

(Record read.)

A I probably did dream of doing that.

Q On the film which the jury has seen your first statement I believe was, "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive."

Are there in fact JDL members who have been trained by the JDL?

A No. There are not. This was an entirely inflated statement as was the entire scene. Everything was merely to serve the press, serve the desires of the press. You have a PLO office in New York right now. It

exists. It has been there. It has not been touched.

THE COURT: Mr. Kelner, the question has been answered.

Q When you made that statement you were aware, were you not, that an Arab spokesman, a PLO spokesman, had been assaulted in New York and hospitalized the preceding month?

A I had read about that in the papers.

MR. DECHTER: Objection, your Honor. Not relevant.

THE COURT: Overruled.

Q You read about that in the papers?

A Correct.

Q You knew that was a matter which had not been kept secret?

A It was in the newspapers.

Q During what period of time, sir, were you in charge of Camp Judel?

A In the summer of 1971.

Q Where is that located?

A At that time the camp -- the camp incidentally does not exist now. It was in Woodburn, New York in the Catskill Mountains.

Q In addition to teaching karate to members of Camp Judel, do they teach how to use firearms?

pgrf 7 Kelner-cross

MR. DECHTER: Objection to what happened at a camp. I see no relevancy between that --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: Mr. Buchwald, do I recall some testimony, I think it was Mr. Miller who said that they were training these people in the Catskills? Is that the basis for your question?

MR. BUCHWALD: Yes. An additional basis to establish that it was well-known that there was such a camp and such training occurred at the camp and that it was therefore known to him that his statements would be interpreted in light of that.

THE COURT: Objection overruled.

MR. DECHTER: I want to make a statement on the record. Let it be noted that the Judge in this case went ahead and told the United States Attorney what he thought the United States Attorney did not remember or did remember. It has to be noted for the record. I feel at this point it is reversible error and I ask at this point for a mistrial.

THE COURT: That does not need comment on my part.

MR. DECHTER: It is on the record.

3a am eorf 1 Kelner-cross

(In open court.)

BY MR. BUCHWALD:

Q In addition to the teaching of karate to JDL members at Camp Judel, were members also taught how to use firearms?

A Yes, there was a familiarization course with small arms for the youngsters at the camp.

Q Any training in marksmanship?

A That falls into that category, yes.

Q The JDL made no secret of the fact that Camp Judel existed, isn't that true?

A That is true. As a matter of fact, the instructors at the familiarization course were certified by the National Rifle Association.

Q You, yourself, had you not, in your public relations capacity prior to November 11th issued statements or press releases concerning Camp Judel?

A I didn't handle the PR for the camp myself, no. I had spoken to members of the media personally a number of times, yes.

Q You are aware that the existence of Camp Judgel was a well-known fact?

A Within the New York State area perhaps.

Q When you made your statements at the press conference, you were aware of that?

A Which press conference?

Q November 11, 1974?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A I don't believe that the average person in New York recalled that there was a Jewish Defense League training camp because it had already been out of existence for a couple of years.

Q Was it your -- withdrawn.

Now, I believe you stated that when the press conference first began -- withdrawn.

In the weeks prior to the press conference, I believe it was your testimony that the JDL had received on the telephone some calls from people, I suppose anonymous people, who said they were from the PLO threatening to hurt or to kill JDL members.

A That is what I was told, yes, by the secretaries who handled the phones.

Q Did you receive any of the calls yourself?

A No, I did not.

Q What were you told about the nature of the threats?

A Well, I was told that, I don't remember specifically, but I do remember hearing that the secretaries were told that our office would be bombed and there may

eorf 3 Kelner-cross

have been other specific threats, I don't recall specifically.

Q Did you feel a sense of anger or outrage at such calls?

A Yes, of course.

Q I take it you reported it to the New York City Police Department?

A It was reported, yes.

Q Did you observe the reactions of others at the JDL to receiving such threatening calls?

A The secretaries were a bit nervous about it, yes.

Q Upset?

A In fact, it was the secretaries that insisted upon having young men in the office at all times, in the hall, watching for anyone who would be unknown who might approach the office.

Q A need for extra security?

A Yes.

Q It inhibited your movements?

A To some extent, yes.

Q Indeed, isn't it a fact that you had a first hand opportunity to personally observe the effects of a threatening communication?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A Well, I guess so. I spoke to the secretaries.

Q And a phone call in which the caller threatens to kill someone from the JDL is an outrage, is it not?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A Of course it is.

MR. BUCHWALD: I have no further questions.

REDIRECT EXAMINATION

BY MR. DECHTER:

Q Mr. Kelner, how do you feel at this point, your state of mind?

A Well, rather tense. I know that there is a lot over my head.You mean sitting here on the stand?

Q Your emotions and so forth?

A I am tense. What can I say?

Q Yesterday?

A Pardon.

Q What about yesterday?

A Yesterday as well. I know that the prosecutor is seeking to convict me and to perhaps put an end to my activities, an end to my teaching career and perhaps worse.

Q Have you been upset by some of the proceedings in this court?

A Yes, I am upset when I see half truths ---

eorf 5 Kelner-redirect

MR. BUCHWALD: Objection. The question calls for a yes or no.

Q Ayes or no answer?

THE COURT: He did, he said yes.

MR. DECHTER: Thank you.

Q Mr. Kelner, the fact that you may have said words that sounded like a threat, was that necessarily a threat?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Did it mean a threat in your mind?

A No, it was not a threat.

MR. BUCHWALD: Objection.

THE COURT: I will allow it. This is repetitious of certain direct examination.

MR. DECHTER: It is on redirect, your Honor.

THE COURT: I allowed it.

MR. DECHTER: I didn't hear the answer.

THE WITNESS: Could you repeat the question, please.

MR. DECHTER: Could the reporter please repeat the question and answer?

(Record read.)

A It was not a threat because I knew that it was a performance that was somewhat exaggerated. It was a

matter of putting things on the record for what the reporters wanted to give to the public.

Q Therefor, you didn't mean what you said, did you, Mr. Kelner?

A No, I didn't.

Q Mr. Kelner, I take you to the statements made by yourself according to the filming here. Was that the complete statement that you made that day?

A Not at all. Even the WPIX film --

MR. BUCHWALD: Objection, this was all on direct.

THE COURT: Yes.

MR. DECHTER: This was gone into, your Honor, by the U. S. Attorney.

THE COURT: I don't remember any of this being gone into on cross examination. It was fully explored on direct examination.

Objection sustained.

No, I will change my mind. You may have an answer to that question. Go ahead.

MR. DECHTER: Would you please repeat it, sir?

(Record read.)

A (Continuing) I will continue. The PIX film --

THE COURT: You have answered that. You say, Not at all." Next question.

eorf 7 Kelner-redirect

Q What was the full context of what you said?

A The full context --

MR. BUCHWALD: Your Honor, I am going to object again.

THE COURT: This is repetitious of what we had on direct.

MR. DECHTER: Your Honor, it requires an answer. To leave it at this point would not be fair to the jury or to the Court.

MR. BUCHWALD: This is the identical testimony on direct examination.

THE COURT: I seem to recall hearing this on direct examination.

Did we hear this on direct examination?

MR. DECHTER: I believe this was said, but in context with what the cross examination has been, it is most important that I be given the opportunity to redirect.

THE COURT: Objection sustained.

Q You stated on cross examination by the U. S. Attorney you dreamed of doing something to Mr. Arafat. Is that correct, what you just said?

A I don't know if it was a dream in sleep, but I daydreamed of it. I have had many thoughts.

Q Fantasizing?

A The fact that my grandfather was killed by Hitler and his troops that have caused me to have many dreams about Yasir Arafat.

Q Therefor, you have other dreams, don't you, sir?

A Yes.

Q And you act out your dreams?

MR.BUCHWALD: Objection.

THE COURT: Sustained.

Q In this particular case what your dreams were, whatever they were regarding Mr. Arafat, did you act out your dream?

A I was, as I said, doing what the reporters wanted me to do. It was a performance, I guess you can call it an act. It might have been a dream, perhaps it was. There was no intent for it ever to take place since it was impossible for it to take place.

Q Let me ask you this, Mr. Kelner:

Would it be unfair for me to say that this whole thing was staged by you or others associated with yourself with the sole intent of creating an atmosphere?

Is that true, yes or no?

A The atmosphere --

Q Yes or no?

A Yes, of the new Jew, as I have said.

eorf 9 Kelner-redirect

Q What about the props, that man standing there, the flag, the desk, all these, were these part of the atmosphere you wanted to create?

A Yes, an Israeli flag --

MR. BUCHWALD: Your Honor, this was all done on direct examination. I object.

THE COURT: Yes. Sustained.

Q I show you Exhibit --

A There were other photographs taken --

Q Excuse me one moment.

Government's Exhibit 3 and I show you that. Do you recognize the picture?

A Yes.

Q Mr. Kelner, was the picture and the people around, was that part of a drama that you were doing?

A That is a good --

MR. BUCHWALD: Objection, your Honor.

THE COURT: Sustained.

Q Was this part of a proposition?

MR. BUCHWALD: Same objection.

THE COURT: Sustained.

Q What was your purpose of that?

MR. BUCHWALD: Objection.

THE COURT: Sustained, repetitious, Mr. Dechter.

MR. DECHTER: Sorry.

Q Camp Judel referred to, is that common knowledge of the average person in the street?

A Counselor, if you refer to the knowledge of the existence of Camp Judel, I would say that it is known to part of the Jewish community, but I wouldn't call it common knowledge.

Q It is not common knowledge to the average person, is it?

A No.

Q The fact -- excuse me, withdrawn.

What were your duties, your personal duties with regard to Camp Judel?

A Well --

MR. BUCHWALD: Objection.

This again was all on direct examination.

MR. DECHTER: Your Honor, this was not. These were questions asked by the U. S. Attorney and answered on redirect.

THE COURT: I thought you brought that out as part of the background on direct examination.

MR. DECHTER: I do not recall that, your Honor, I'm sorry.

MR. BUCHWALD: Page 237 of the transcript.

MR. DECHTER: Let's read back 237 of the transcript.

THE COURT: I decline to do that. If there is more that you want to add that bears on the cross examination, I will consider it.

Q I refer you to page 237 --

THE COURT: The objection is sustained as to form when you begin that way.

MR. DECHTER: Sorry. Your Honor, respectfully I have before me a transcript of United States of America against Russell Kelner on questions and answers on direct of Russell Kelner.

I would like to quote --

MR. BUCHWALD: Objection.

Q Were these questions asked and were these the answers --

THE COURT: No, I sustain the objection. That is already in the record. If you want to bring out anything bearing on the cross examination that is not already in the record, you may do so.

Q Mr. Kelner, weren't your activities one of public relations within Camp Judel?

A Yes. I had to greet and escort --

MR. BUCHWALD: Objection, your Honor.

THE COURT: Yes, sustained. Is that in the direct examination?

MR. BUCHWALD: Yes.

MR. DECHTER: Yes, your Honor, but it was gone into by the U. S. attorney.

THE COURT: Objection sustained. There is no need to be repetitious. Let's go forward.

MR. DECHTER: I believe it is germane to the issue and it is most important that we get into what the responsibilities of Mr. Kelner were. He is on trial. Not JDL, that is the only thing that is at issue, your Honor. I respectfully state to the court that I take an exception, if the court would be good enough to give me an opportunity to ask questions of Mr. Kelner.

THE COURT: I said if you want to get into things that are not repetitious that bear on the cross examination, I will permit it. I have said that twice now.

MR. DECHTER: I am sure your Honor will.

Q Did you personally teach karate?

A I don't know karate myself.

Q You mean you don't even know karate?

A That's right.

Q You therefore couldn't teach it, is that right?

A That's right.

MR. BUCHWALD: Objection, your Honor.

THE COURT: Overruled.

Q Answer?

A I cannot teach it because I don't know it.

Q Mr. Kelner, for the last time, I am going to ask you in your own words what the intent of your remarks were regarding this statement which was shown in the courtroom?

A Well, it was the intent at that time --

MR. BUCHWALD: Your Honor, I am going to object again. This is the same as direct.

THE COURT: Sustained.

Q Was there any threat involved at all.

MR. BUCHWALD: Objection.

THE COURT: Sustained.

A No threat to Yasir Arafat.

MR. DECHTER: Thank you, your Honor. No further questions.

RECROSS EXAMINATION

BY MR. BUCHWALD:

Q On redirect examination you testified, sir, that you didn't mean what you said. Am I correct, sir, that you didn't mean what you said on -- that was your testimony, you didn't mean what you said?

MR. DECHTER: Objection, your Honor, to the form of the question.

Q Is that correct?

THE COURT: He is asking if that was his testimony as a foundation. Was that your testimony?

THE WITNESS: That is correct, I didn't mean what I said.

Q And by that am I correct, sir, that what you are saying is you did not actually intend to have Arafat assassinated?

A I did not intend, of course.

Q But am I not also correct, sir, that you did intend to state the words that you stated to the press?

A They came out of my mouth, but I wasn't thinking.

Q You intended, did you not, to display anger?

MR. DECHTER: Objection, your Honor.

This is argumentative.

THE COURT: Overruled.

Q Before the press ever got there, isn't it a fact that you had decided that it was important that anger be shown?

MR. DECHTER: Objection, your Honor. The same questions were asked and he is badgering the witness, your Honor.

THE COURT: Overruled.

MR. DECHTER: Respectfully, your Honor, I would like it to be noted the method that the question is being asked by the U. S. attorney --

MR. BUCHWALD: I think it is absolutely impossible for the jury to follow the cross examination of this witness with Mr. Dechter's constant interruptions.

MR. DECHTER: My constant interruptions have to do with objections which I have a right to make.

THE COURT: Mr. Dechter, both of you gentlemen will please refrain from colloquy and just put questions and I will rule on objections simply stated.

Go ahead.

eoa6 Kelner-recross

MR. BUCHWALD: May we have the last question read back.

THE COURT: You may.

(Question read.)

A The executive director of the JDL told us to have a press conference.

MR. BUCHWALD: That calls for a yes or no.

THE COURT: That is not responsive.

A I did not decide that.

Q You did not decide it. Do you recall testifying yesterday at page 258 of the transcript --

MR. DECHTER: May I have one minute.

Q "I felt that anger had to be shown at this time."

A That's right. It was not my decision.

Q Did you feel that anger had to be shown?

A Of course, because we felt anger.

Q And you intended to show that, isn't that a fact?

A We wanted to show the anger of a Jew who has been pushed around. We had to do that.

Q Did John Miller, who testified here, put words in your mouth?

A So to speak. I was provoked by the rapidity of the questions coming from the press.

Q When he said, "Take it from the top," and then you said, "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive, was John Miller putting words in your mouth?

MR. DECHTER: Objection, your Honor.

THE COURT: Overruled.

A Yes, to an extent.

Q With the tension and the nervousness which you feel here being a defendant on trial, have I put any words in your mouth?

A No, none at all.

MR. BUCHWALD: No further questions.

MR. DECHTER: Redirect, your Honor.

REDIRECT EXAMINATION

BY MR. DECHTER:

Q When Mr. Miller asked questions of you, do you recall his saying, "How do you plan to do that? Are you going to kill him"? Did he say that?

A That's right.

Q Was your answer, "I am talking about justice.

I am talking about equal rights under the law, a law that may not exist but should exist"? Did you say that?

A Yes.

Q Did the reporter then say, "Are you saying that you plan to kill them"?

A Yes.

Q Was that the question of Mr. Miller?

A That was his question.

Q Therefore, these were statements that you were making?

A That's right.

Q Were you provoked that day?

A Well, I wasn't making a statement. I was feeding his questions with answers.

Q I ask you again: were you provoked?

MR. BUCHWALD: Objection.

MR. DECHTER: I didn't hear.

THE COURT: Provoked?

MR. DECHTER: Provoked.

THE COURT: Yes, sustained as to form.

Q Did you feel that the questions asked of you by Mr. Miller and others -- were they inflammatory to you?

A Yes, they were.

Q And therefore you answered out of anger?

A I wasn't angry at the media. I had some anger at the presence or the imminent presence of Yasir Arafat in New York. I was very emotional at the time.

MR. DECHTER: Excuse me, your Honor, I do not have a transcript of the few pages that Mr. Buchwald referred to. Can I please see the transcript.

MR. BUCHWALD: Mr. Dechter cannot see my question sheets, your Honor.

MR. DECHTER: I am talking about the transcript.

MR. BUCHWALD: The copy of the complaint.

MR. DECHTER: You referred to statements about anger in the transcript, your Honor.

MR. BUCHWALD: I will be more than happy to have the film replayed, your Honor.

MR. DECHTER: Your Honor, there were questions asked. I only respectfully ask that we have received up to page 254, if there is any page after 254 I do not have that transcript.

MR. BUCHWALD: You are talking about the transcript of this trial?

MR. DECHTER: I am talking about the minutes.

THE COURT: I think he is asking about the page reference that had to do with anger.

THE WITNESS: Mr. Dechter, I received the remaining pages this morning. I think you will find them under my briefcase this morning. They were published late and not available yesterday. Underneath the briefcase, I believe, in the blue binder or blue cover, on the table itself.

THE COURT: Lift up the briefcase.

MR. DECHTER: Your Honor, could he have an opportunity to come over here and show me where it is.

THE COURT: It is underneath the briefcase.

THE WITNESS: Or beside it.

MR. BUCHWALD: I will give him my copy.

MR. DECHTER: I have it. I did not have it yesterday. This is the first time that I am seeing this right now, your Honor.

What page -- Mr. Buchwald, would you please tell me what page you were referring to?

MR. DECHTER: Can we have the page from the transcript?

MR. BUCHWALD: I think page 258.

Q On the same page, 258, was this question asked and was this the answer. The question asked is a question of belief:

"What was your belief, Mr. Kelner?

"A My believe was that it was very unjust to allow the head of a terrorist organization that has killed children to come into the United States without any indictment of him whatsoever."

MR. BUCHWALD: That has nothing to do with what I asked, your Honor, which is further down on the page 258.

THE COURT: Sustained.

MR. DECHTER: Your Honor, respectfully.

Q "Q Were you expressing those beliefs during the filming of that episode that we saw in court today?

"A If I had expressed those beliefs per se, it may have been somewhat redundant because they were expressed by many Jews in the community.

"I felt that anger had to be shown at this time."

MR. DECHTER: Is this an accurate statement of what was said, Mr. Buchwald, that you have there?

Am I reading it accurately.

MR. BUCHWALD: Ask him if it is his testimony?

Q Is that your testimony?

A I imagine so.

Q Do you know if you said that?

A Yes.

Q Was there a question further:

"Were you frustrated"?

MR. BUCHWALD: Objection to his reading the transcript.

THE COURT: Sustained.

MR. DECHTER: No further questions.

MR. BUCHWALD: No further questions.

THE COURT: You may step down.

(Witness excused.)

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MR. DECHTER: One further question, your Honor. May I have the opportunity for one further question.

THE COURT: Tell the witness to come back.

R U S S E L L K E L N E R resumed.

RECROSS EXAMINATION

BY MR. DECHTER:

Q Mr. Kelner, I ask you whether you are nervous on the stand at this time?

MR. BUCHWALD: Objection.

THE COURT: Sustained.

Q Were you nervous yesterday?

MR. BUCHWALD: Objection.

A Yes, I was.

Q You are upset at this time?

A Very much so.

MR. DECHTER: No further questions.

MR. BUCHWALD: I have nothing else.

(Witness excused.)

THE COURT: Ladies and gentlemen, we will take our 10-minute recess at this point.

(Recess.)

(Jury present.)

MR. DECHTER: Your Honor, may we have a

side bar for a moment?

THE COURT: All right.

(At the side bar.)

MR. DECHTER: We are waiting for another character witness who is important to the defense. That's the reason for the delay.

THE COURT: When is this witness expected here?

MR. DECHTER: They tell me in two or three minutes.

THE COURT: We will wait three minutes. If the witness is not here you will have to go on with your case.

MR. BUCHWALD: Your Honor, it is my understanding that at 12 o'clock today there is a demonstration on behalf of Siviet Jewry which is expected to take place on the steps of the courthouse. I would ask that the jury be sequestered over lunch.

THE COURT: Who is the demonstrating organization?

MR. BUCHWALD: I am not certain.

MR. DECHTER: The Soviet Conference, which is led by Eugene Gold, the DA of Brooklyn.

THE COURT: Would it be possible to have

the jury fed in over the lunch hour?

THE CLERK: Yes.

THE COURT: We will get lunch to them then.

MR. DECHTER: People have their rights to participate, to express their beliefs, and it has nothing to do with this case.

THE COURT: It is inappropriate under the circumstances of this case for this to come to the jury's attention at this point.

It is now 12 minutes after. I'll give you two more minutes and then you will go forward with the case, character witness or not.

(Recess.)

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: It is almost a quarter past. are you prepared to go forward with any more witnesses?

MR. DECHTER: I don't have this person available. I would like to put on the record I was trying to get hold of one particular witness.

THE COURT: A character witness?

MR. DECHTER: Yes.

THE COURT: That person is not available?

MR. DECHTER: At this moment he is not here.

THE COURT: You have no further witnesses?

MR. DECHTER: I have no further witnesses.

THE COURT: Do you want to rest on the record?

MR. DECHTER: I rest on the record.

MR. BUCHWALD: May we have the other gentleman identified at the defense table?

MR. DECHTER: Nathan Decter, another attorney, my brother.

(In open court.)

THE COURT: Mr. Dechter?

MR. DECHTER: At this time, your Honor, the defendant rests.

THE COURT: Do you have any rebuttal, Mr. Buchwald?

MR. BUCHWALD: No, your Honor.

THE COURT: At this time we will stand in recess, ladies and gentlemen. I will have you return to the jury room where I will have you stay for a moment, both sides having rested.

(The jury left the courtroom.)

MR. DECHTER: May we approach the side bar? I would like to make a motion.

THE COURT: Go ahead.

MR. DECHTER: In regard to sequestering a jury prior to deliberations, the jury is not at this time out, I think the court is hampering the jury's right to freedom of movement. There is no reason why a jury should be sequestered. They may think or impugn anything that may come to them, that there is something sinister going on. They know, as most citizens know, they should not be sequestered unless there is a particular situation. I respectfully ask the court to give them the same opportunity anyone else has. They have read the newspapers or heard TV and they know there is a case going on.

THE COURT: You would like them to walk out right across the building and through a demonstration on behalf of Soviet Jewry?

MR. DECHTER: Your Honor, the statements made by this court, time and again, I find they are short of being reprehensible. I did not say that.

THE COURT: Sir, I won't tolerate that from you or any other counsel and I'll give consideration to that remark.

Your thought that this jury should have extraneous influences on it that you know are occurring outside the building --

MR. DECHTER: I did not say that.

THE COURT: That's the effect of what you are saying.

MR. DECHTER: That's not my effect.

THE COURT: Your statement, your request, is denied.

MR. DECHTER: Sorry.

THE COURT: Are there any motions at the close of the entire case.

MR. DECHTER: Your Honor, I renew my motion to dismiss the indictment again on the grounds that the indictment does not state facts constituting an offense against the United States based upon the reasons I gave before, and it is based upon the papers which I submitted to this court and to the United States attorney. Statute Title 18, United States Code, 875, is vague, too general and indefinite, and inapplicable to the conduct of the defendant, and thereby the indictment is unlawful and invalid.

Also to the apparent vagueness of the statute, it does not include the conduct of the defendant, and

I must state to the court that there are a number of cases -- I do not want to repeat what was already said in the record. There are a number of cases which hold otherwise.

Certainly I would like to stress United States vs. Rogers:

"Where the court instructed the jury that a true threat as required by statute is a serious threat and not words uttered as a mere politican stand, argument or jest, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of any apparent determination to carry out the threat."

That is one of the cases which I cited.

I cited Dennis vs. United States, and that case held "That mere teaching of the morale necessary to resort to force or violence is not the same as preparing a group for violent acts and steeling it to such act. A statute which fails to draw this distinction" --

MR. BUCHWALD: May I make one inquiry?

THE COURT: Yes.

MR. BUCHWALD: Is it the defendant's intention to seek to adjourn early this afternoon?

MR. DECHTER: I am making motions. I have no intention to do anything.

MR. BUCHWALD: I full suspect, your Honor, the defendant is endeavoring to assure that deliberations cannot begin until Monday, and they will be making their request to adjourn early this afternoon in view of the fact it is Friday.

MR. DECHTER: Your Honor, I do not know what the United States attorney is thinking. It is beyond me. I am making motions that I must make. This is my obligation to my client.

THE COURT: You make the motions. Your motions for a judgment of acquittal on behalf --

MR. DECHTER: May I finish the statement? Three more lines.

"A statute which fails to draw this distinction intrudes upon the freedom guaranteed in the First and Fourteenth Amendment. It also stated that when the gravity of the evil lessened by its improbability justifies the invasion of freedom of speech to avoid the danger."

On these points, your Honor, I feel that certainly -- on the basis of what came out is evidentiary -- the people have not sustained their burden.

I ask that this particular indictment be dismissed at this time.

THE COURT: Motion denied.

MR. DECHTER: Exception noted.

THE COURT: Are the parties ready to commence summations?

MR. BUCHWALD: I believe it would be appropriate to preliminarily review the requests to charge.

THE COURT: We will do that in the robing room.

4b am pgrf 1

(In the robing room.)

THE COURT: It is going to be a pretty standard charge.

MR. DECHTER: I have a couple of requests. I know it is late. I respectfully ask the Court, Judge, to consider this and if the Court would be good enough -- I cannot type it up. It is last minute stuff. I am doing this under a tremendous amount of personal strain. I have not been sleeping and so forth. I'm doing this alone. I have no help.

Could the Court include, if it would want --

THE COURT: Let me see what they are and I will try to -- I would give a charge on character witnesses.

MR. DECHTER: Most important, what I'm trying to get across is the character of the witness is as good as they were, and that in itself creates a question of reasonable doubt.

THE COURT: I give the appropriate charge in that regard.

MR. DECHTER: I'm trying to make sure. That is all.

THE COURT: I give the appropriate charge in that regard.

MR. DECHTER: I'm trying to make sure. That's all.

pgrf 2

THE COURT: I give the intent charge in substance.

I give the presumption of innocence charge.

I give one on reasonable doubt.

I give one on the individual decision of the juror.

I charge on wilfulness.

As a matter of fact I give in substance everything you have asked for.

MR.BUCHWALD: I have not reviewed that.

I have one page of typewritten requests which Mr. Dechter provided me with.

MR. DECHTER: I thought I gave that to the Court.

THE COURT: I have never seen this.

MR. BUCHWALD: There is in that a request on wilfulness to which I would take strong exception.

(Pause.)

MR. DECHTER: Because of the nature --are we finished?

THE COURT: Yes.

MR. DECHTER: Then the charge to the jury is all set?

THE COURT: I have a charge that is all ready to go.

Mr. Buchwald, what is it that you have any concern about inasmuch as it affects --

pgrf 3

MR. BUCHWALD: My most particular concern is the charge with respect to the elements.

THE COURT: I will not charge that.

MR. BUCHWALD: That it is not necessary that he intended to carry out --

THE COURT: I will charge substantially as you requested in your request No. 2.

MR. DECHTER: May I see that?

MR. BUCHWALD: I previously furnished you with a copy.

THE COURT: I am going to charge it is not necessary that the Government prove the defendant actually intended to carry out the threat.

MR. BUCHWALD: Off the record.

THE COURT: I'm going to charge it is not necessary for you to find that the defendant actually intended to carry out the threat. It is necessary to find he intended to make the threat, actually made the threat knowing that the threat was a true threat. What must be wilful is the threat. He must have had an intention to make a true threat.

MR. DECHTER: Will you be charging on intent?

THE COURT: Yes.

Off the record.

pgrf 4

(Discussion off the record.)

MR. DECHTER: One further thing, if I said anything that may have been overstated, I'm sorry. I respectfully withdraw that. I didn't mean it. It was in the heat of my own personal problem I'm having here. I have a tremendous amount of pressure. Another lawyer was supposed to do it. I came in last week. I feel you are a very fair and impartial judge.

THE COURT: I accept that.

MR. BUCHWALD: If I might address myself to one further point: I'm a bit fearful that there may be some ambiguity in the term "true threat,", particularly when there is so much argument by the defense that has been made that Mr. Kelner didn't intend to kill anybody.

MR. DECHTER: That is a fair statement, that a threat is such a word that can be misinterpreted. There has to be proof.

MR. BUCHWALD: What is a true threat other than a threat?

MR. DECHTER: A threat that is true.

MR. BUCHWALD: I'm afraid by using the words "true threat" the jury is going to believe he must have mean to carry it out.

MR. DECHTER: I think the judge can consider that.

pgrf 5

I think it is a fair statement, a true threat. There is nothing wrong with that.

THE COURT: I'll read to you what I intend to charge leading up to that.

The Government must initially establish beyond a reasonable doubt the defendant made a true threat to Yasir Arafat. A threat as commonly understood is an expression of intention to inflict injury or damage on another.

In order to constitute a threat the statement must be of such a nature that would reasonably cause fear.

A communication is threatening when the communication in its context would have a reasonable tendency to create a presentation that its maker would act accordingly.

It is not necessary for the Government to prove that the threat was actually communicated to the threatened person or it had any particular affect on that person.

Under the statute I charge you that a threat may be made by words alone for it is the utterance that is the criminal act. You must therefor judge that the message has been communicated.

MR. DECHTER: I think it is fair to both sides.

MR. BUCHWALD: The way I view the facts is that it was a false threat. It was a threat he didn't intend

pgrf 6

to carry out. I think that is sufficient under the law, if he intended it as a threat.

MR. DECHTER: If we were to allow the United States Attorney to make up the charges I might as well not be in the case.

THE COURT: He is merely representing to me what he thinks is fair.

MR. DECHTER: I think that statement, the one I just heard, is a fair statement of the law and the facts, and I respectfully ask that it be held just as the judge read it.

THE COURT: Let me see whether this doesn't create a misleading impression in the context of this case.

MR. DECHTER: How are we going to work now? I'm willing to start or go.

THE COURT: Under the Court's present ruling you would start, Mr. Buchwald.

THE MARSHAL: In order to avoid the demonstration, no restaurants on the east side of the court house will take us, and to get to a restaurant on the west side avoiding the demonstration we will have to take the jury through our office, put them in the marshal's bus and drive them around the demonstration to the restaurant; then we

pgrf 7

will pick them up and bring them back the same way so at no time will they see the demonstration.

MR. DECHTER: I'm only concerned how this looks to a jury. My concern is --

THE COURT: Mr. Dorsey has told them --

MR. DECHTER: Are they going to get hurt out there?

THE COURT: They will be treated to lunch.

MR. DECHTER: Isn't that unusual?

THE COURT: No.

MR. DECHTER: If you feel that is fair, all right.

THE COURT: We better do it right now.

THE MARSHAL : When it is convenient to your Honor.

THE COURT: How soon will they be back?

THE MARSHAL: 2:00 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:40 p.m.

(In open court, without the presence of the jury.)

MR. DECHTER: Your Honor, there is a motion I believe I did not make. We have a court reporter?

THE COURT: Yes.

MR. DECHTER: After the complete case, the people's case, the completion of both cases, I respectfully state to the Court that the people have not proven their case beyond a reasonable doubt.

THE COURT: You made a motion for a judgment of acquittal.

MR. DECHTER: Judge, if you would be good enough, this is beyond a reasonable doubt and the reasons for it become one that would go into extensive discussion including the most important pertinent point is there was no intent shown here at all to commit a crime, no matter what crime it was, and this particular crime, if it is a crime, is one that shows no intent. There was language used out of anger, out of frustration, out of emotion and therefor the people definitely by no substantive credible evidence have they shown the slightest bit of evidentiary matter which would be beyond a reasonable doubt. I respectfully ask the Court at this point to acquit the defendant.

THE COURT: I think the jury has before it evidence on which it could conclude to the contrary so I will deny the motion.

MR. DECHTER: Your Honor, does that mean, I would like to hear your ruling on that.

THE COURT: I believe there is evidence in this case from which the jury can find to the contrary so I deny your motion.

MR. DECHTER: You deny the motion.

It is very hard to hear back here. The acoustics in this room are terrible for the future, your Honor. There should be a mike.

(Jury present.)

MR. BUCHWALD: May I proceed, your Honor?

THE COURT: You may.

MR. BUCHWALD: May it please the Court, your Honor, Mr. Dechter, Madam Forelady, ladies and gentlemen of the jury:

You have now heard all of the evidence in the case and after the lawyers have completed their summations you will hear his Honor's instructions on the law that applies to the case, his charge to the jury on the law which you are to apply here.

Then your deliberations begin. Now, the

summations, I sum up and then Mr. Dechter sums up and he gets the opportunity to respond to what I say and I get a brief rebuttal period and you may see me, for example, sitting down while Mr. Dechter is summing up and not jumping up and objecting and that doesn't mean that I agree with him and the fact that Mr. Dechter may not object while I am saying something doesn't mean that he agrees with me. That is simply a courtesy which lawyers frequently extend to one another during summations.

They can object if they want, but you shouldn't conclude from the failure to object that we agree with one another.

During the course of your deliberations you can ask to have any part of the testimony read back to you. You can ask to see any of the exhibits.

For example, the UPI advisory, that is the advisory which United Press International sent out to its subscribers at 6:00 o'clock on the evening of November 11th after the JDL representatives had called the UPI and told them that there would be a press conference at 8:00 ostensibly for the purpose of discussing the PLO threats against JDL members a press conference which as you know was held by Mr. Kelner at that time.

You can see during the course of your deliberations the photograph which was taken by one of the newsmen and

depicts the scene at JDL headquarters when the newsmen first entered the press conference room where Kelner was conducting the press conference.

Most importantly, however, you can ask to see again the film itself. You are entitled to do that during your deliberations, to see it as often as you want and, ladies and gentlemen, please don't let the fact that we had certain technical difficulties in first trying to show it to you inhibit you from requesting to see it as often as you need to, as often as you want during your deliberations.

It is the most important piece of evidence in this case. There is no real question, is there, that the film was placed on WPIX; that it was beamed out into states other than New York.

It is the most important piece of evidence in this case, ladies and gentlemen, because it contains Kelner's own words, his intonations, the serious manner in which he stated what he said. It captures better than anything else the message which he intended to convey.

You heard him here. They put the gun on the table, the men in the uniforms, for the very purpose of making sure that what they said was not interpreted as a joke; that it was interpreted seriously. They didn't intend to actually carry out the threat, but he wanted it

to be interpreted in that serious manner in which it was uttered was the message of a planned assassination, the threat to have Arafat assassinated.

Ladies and gentlemen, before I review with you the evidence in detail in the case, as I would like to do, let me make two preliminary observations. I think they are important to keep in mind and as I make these two preliminary observations let me remind you again that it is his Honor who will be instructing you on the law. I don't want to pretend to be doing that. That is not my function. That is his Honor's function and he will do that.

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The first preliminary observation which I think is important to keep in mind is that the defendant is not charged in the indictment, not charged with actually plotting to assassinate Arafat. That is not the government's contention. It is not the charge in the indictment. Maybe he intended to carry it out; maybe he didn't. He says he didn't.

Ladies and gentlemen, that is not the issue. He himself says he doesn't know what he would do if he got the chance or if the security precautions weren't so tight. He is not charged with that.

The question is did he intend to convey a threat. Not did he intend to carry it out. Did he intend to convey it?

Ladies and gentlemen, he himself saysd that he knew that the words sounded threatening. He intended them to be taken seriously, not as a joke. He wanted to create the appearance of reality. He himself admits that.

Ladies and gentlemen, did he convey the threat? Not did he carry it out. That is the really crucial question before you because in the case of a threat to inflict bodily harm on someone, of a threat to kill someone, because of the apprehension it

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can cause, of the inhibiting effect it can have on the activities and free expression of others, because of the dislocating effects it can have in our society as a whole, because of this, the interstate communication of such a threat is itself proscribed whether or not the person who makes the threat actually intends to carry it out.

Ladies and gentlemen, that was the first preliminary observation and there is a second one that I would like to make. Perhaps it is so obvious that it need not even be made, but I think in light of what has transpired during the trial it ought to be said anyway.

It has to do with PLO and Arafat, Yasir Arafat, and I think it has to do even more fundamentally with the rule of law, the concept of the rule of law.

The crime directed against a man, ladies and gentlemen, doesn't become a noncrime just because that man is unpopular. It doesn't become a noncrime just because that man is hated and despised. It doesn't become a noncrime even if that man is hated and despised with good reason.

Ladies and gentlemen, it may be a relevant consideration in some other context, but not in the

context of is it a crime, is the defendant guilty or not guilty.

The other side of that coin is the fact that you have a noble motive or what you yourself view as a noble motive, it doesn't excuse a crime. It doesn't make it less of a crime. You can't rob the bank because you want to get the money to donate to the Red Cross. The fact that there is a noblemotive, that may be relevant in certain other contexts, but not on the question of is it a crime, is the man guilty or not guilty?

Ladies and gentlemen, the same law that prohibits interstate communication of the threat to assassinate Yasir Arafat by a man who opposes Arafat applies across the board. It applies to a threat to kill any foreign visitor, be he from an Arab state or from Israel or from a Communist country or from a democratic country.

It applies to a threat to kill any citizen of our country. It applies to a man who intentionally threatens to kill anyone, to a man who intentionally threatens to kill Russell Kelner because he disagrees with Russell Kelner, even if he strongly and sincerely disagrees with Russell Kelner.

It applies across the board and we eitherr, all of us, live by the rule of law or we risk foresaking the protection which that rule of law affords to all of us.

Now, maybe that didn't have to be said and I suspect it didn't have to be, but I hope that no one here loses sight of it.

Let me review with you, if I might, some of the evidence in the case. The PLO delegation was staying here at the Waldorf-Astoria in November, on or around November 11, 1974. Yasir Arafat was scheduled to join them. He was supposed to make a speech in the General Assembly of the United Nations.

The UN's invitation to Arafat to come and speak caused a great deal of consternation and protest by many people here in New York. A broad spectrum was opposed to Arafat's visit, not just the JDL, not just Jewish people, many people, New York City, out of the city, around the world, were dismayed and appalled that the UN would invite a man like Arafat to come and speak.

Many people, not just members of the JDL, but including members of the JDL, engaged in peaceful demonstrations. They chanted slogans. They carried

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around signs and placards.

Mr. Kelner himself participated in some of these peaceful demonstrations. He himself described some of the signs and slogans.

"No, no, PLO. There is no Palestine. Israel Must Live."

All of this is undisputed and none of it is a crime. The PLO is not immune from free speech. People in this country, in this city, can express their opinions about the PLO and an individual, ladies and gentlemen, in our society is perfectly free to express his opinion about other individuals on public issues even with extremely strong and vehement language. Such expressions of opinion, ladies and gentlemen, in our society may properly include sharp personal attacks, verbal abuse, unpleasant and even abusive language, but, ladies and gentlemen, the free flow and exchange of ideas does not include the communicating of threats to have someone killed.

Mr. Kelner knew that. He admits as much. He says that the New York City Police Department had been notified when the JDL received threats to be killed from the PLO on the telephone. He knew that that was wrong.

Ladies and gentlemen, there is a vast difference between expressing one's view even in the most vile and vituperative tones and threatening to take the life of another human being.

Ladies and gentlemen, one might call the murdere of Ma'alot whatever he thinks, and in this free country, which protects your right to do so, most if not everyone else in our city will agree with the man who calls Arafat those names. But no man has license to threaten to take the life of another human being, and if that, ladies and gentlemen, is what you find the defendant did here, if the elements of the crime are satisfying in accordance with his Honor's instructions on the law, then your duty under the rule of law is clear.

Mr. Kelner testified that for a few weeks preceding Arafat's visit the JDL had received anonymous telephone calls from people claiming to be from the PLO threatening to do bodily harm, to kill members of the

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JDL. Maybe he is telling the truth about that; maybe not. If it is the truth, and assuming for the moment it is the truth, that is a crime and those callers, if they are caught, ought to be prosecuted. The JDL notified the New York City police, said Mr. Kelner. They knew that the communication of threats was a crime, and if Kelner is telling the truth about that, ladies and gentlemen, then he well knew and could well appreciate first hand, from the sense of outrage and apprehension he himself felt from the communication of such threats, why the intentional communication of such threats is itself proscribed whether or not the caller actually intends to carry out the threat.

In any event, ladies and gentlemen, Kelner knew from the fact of peaceful demonstrations in which many people participated and from everything the JDL had ever stood for that it would hardly be news to anybody that the JDL opposed Arafat. So he, and he admits it, the JDL, several hours before the press conference on November 11th, they called the United Press International and other representatives of the press and told them there would be a press conference at 8 o'clock that night at which ostensibly the JDL would discuss the threats from the PLO.

Do you remember, ladies and gentlemen, all those questions on the cross examination of Mr. Goldschlag from UPI by the defense attorneys? The questions: Well, it might not have been the JDL that called? It might have been anyone?

What was the defense trying to do there? They were trying to negate the notion that it was the JDL, that it was specifically Mr. Kelner who caused those transmissions in interstate commerce, who initiated the press conference which ultimately led up to those transmissions.

Ladies and gentlemen, it may be true that Mr. Kelner is not an employee of WPIX, but he certainly caused that telecast. He put everything in motion.

Ladies and gentlemen, when Kelner threatened to have Arafat assassinated, didn't he want that to be broadcast? Why call a press conference in the first place? Is it even newsworthy that the JDL opposes Arafat? The press certainly knew already from a demonstration at the Waldorf and everything else that Kelner and the JDL didn't like Arafat. He hardly needed a press conference to make that known.

It was the threat to have Arafat killed that

he wanted broadcast and that's why the UPI was called and that's why the other media representatives were called, and that's why, when the press arrived at 8 p.m. they were brought into the small room and then Kelner's office. They were allowed in with the camera and the microphone and the lighting equipment. He was all ready for them. The gun was already in place for its effect, "for," in Mr. Kelner's words, "appearance's sake."

Ladies and tentlemen, the notion that Russell Kelner didn't intend, expect, and desire to have that threat broadcast when he looked directly into that WPIX camera and spoke into that microphone which said "Channel 11," at a press conference that he was all ready for, and which the JDL had called, the notion that he didn't intend it to be broadcast simply flies in the face of common sense. And common sense together with the testimony in the case and the exhibits in the case are what you bring into that jury deliberation room with you.

He didn't roll the projector of WPIX during the 10 p.m. news but that's exactly what he wanted to happen. He did everything in the world he could to have it happen, from holding and conducting

the press conference to speaking right into the camera, placing the gun in his holster so that everyone, everyone, would interpret what he said seriously and not as a joke.

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Without Russell Kelner, ladies and gentlemen, there could have been no such broadcast -- without the press conference, without the words he uttered, the way he uttered them.

Ladies and gentlemen, it is like writing a letter threatening to kill someone. You write the letter in clear and unambiguous terms. You put it in an envelope and you address the letter and put the stamp on the envelope and seal the envelope and you put the letter in an out box in your office together with a lot of other mail in the hope that the messenger is going to come around and collect all the letters from the out box and put it in the mailbox outside.

Ladies and gentlemen, the fellow who comes around and collects all the mail and sticks it in the mailbox, he is not guilty of a crime any more than WPIX is guilty of a crime for covering the news, but the letterwriter, the man who did everything he could to bring about the result of getting that letter into the mail, the man who hoped and expected and intended that result, he is the one who causes the mailing whether he drops it in the mailbox or not. He is the one who has committed the crime, and I would submit to you that this is just like that mailing of a letter situation.

pgrf 2

Finally, in considering the question of whether the defendant caused the threat to be transmitted interstate, you will not be without guidance. His Honor is going to instruct you on the law. That is not my province. His Honor will do that at that close of summations. I ask you to listen carefully to his Honor's instructions on what the legal meaning of that term is, lest you be used by either counsel as to what it means.

After you hear and consider those instructions on the law from his Honor, I submit to you that you will find from the proof that Kelner made the threat, he intended and expected that it would be broadcast and, that this element of the crime has been satisfied.

So what were all those questions by the defense attorney to Mr. Goldschlag about? It could have been anybody who called the UPI, right?

Ladies and gentlemen those were just smokescreens, aren't they? Of course they called the press conference themselves. They were ready for the press conference when it started. The gun was there in its place and by the time that Mr. Kelner was testifying the defense had dropped that argument, that maybe it was somebody outside the JDL who had called the press.

So the press and the radio and TV are contacted.

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You will recall that UPI, the wire service, in turn, advises subscribers through the advisory that there will be that 8:00 o'clock press conference.

In the meantime earlier in the day, around 4:00 o'clock, Don Miller, the young man who testified here, at WPIX, had gone to cover the JDL demonstration at the Waldorf where the PLO delegation was staying. He had replaced another channel 11 reporter and had joined up with the other three members of the camera crew outside the Waldorf.

After WPIX received the UPI advisory, the channel 11 crew at the Waldorf received word to cover the JDL press conference at 8:00 o'clock. They returned to WPIX's studios and picked up the adviser, and went over to 1133 Broadway, up to the 10th floor. There was no surprise. The JDL was ready for the press.

The men in military garb escorted the WPIX crew to the small outside office. Other news crews from radio stations and the press are already there. The doors open to the larger office, Kelner's office. Kelner is there waiting and ready. He had been there all day. He knew hours in advance there would be a press conference and to make sure that what he said sounded newsworthy and was disseminated in the media and was not

interpreted as a joke, he has the men in military garb standing at his side and the gun in his holster on the table.

One of the newsmen takes the photograph which you have seen.

Kelner starts to make his statement before the WPIX crew has set up. They are the only TV crew. They had the most equipment there to set up.

John Miller testified that he primarily was concerned at this time with getting his crew set up properly but he got the basic idea of what Kelner was saying.

Miller had no recollection as he testified here about Kelner saying anything about threats from the PLO. Kelner says he did say something about threats from the PLO and maybe so.

But, in any event, the evidence is clear, ladies and gentlemen, Miller recalls Kelner saying something during his statement about "We are going to get them" and then the members of the press all interrupt, what do you mean by "get"?

What do you mean by "get".

Kelner: We are going to assassinate Yasir Arafat. He will not leave the country alive.

The channel 11 crew now gets set up. They take a little bit of film without sound. Remember that testimony and from the film itself, the desk and the two surrounding men and they focus in on the holster. They take no sound in the beginning so that I think the way Mr. Miller explained it when it is played on TV later the anchorman speaks over the film and in effect introduces the film to the viewing audience.

Miller asks Kelner, take it from the top. Please repeat his statement.

Then the sound starts and Kelner looking straight into that WPIX camera, which you can't miss, speaking into

that microphone which says channel 11 says, "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive."

You have seen that film and I urge you to see it again and again.

What else does he say after that statement, which is the first statement on the film? The reporter: How do you plan to do that, you are going to kill him?

Kelner: They will do it. I can't tell you the details, but it is going to be done. There will be justice.

The reporter: Are you talking about murder?

Kelner: I am talking about justice. I am talking about equal rights under the law.

MR. DECHTER: Your Honor, I must object at this time because there is nothing in my complaint that would indicate any of these remarks being accurate.

THE COURT: The jury's recollection of what they heard in the film will govern.

MR. DECHTER: Sorry, your Honor, I must object strenuously that what he is reading is not an accurate portrayal of what was said and that is germane and I think at this point what he just did, your Honor, and what he has been doing for the last few seconds --

THE COURT: Let's not get into any editorialization here, please.

MR. DECHTER: Your Honor, I respectfully object and I ask respectfully for a mistrial.

THE COURT: A mistrial is denied.

MR. BUCHWALD: If I may continue, ladies and gentlemen.

Ladies and gentlemen, I urge you again, ask to see the film yourself.

THE COURT: Ladies and gentlemen, let me just stop Mr. Buckwald here for a minute. If there is any question in your minds as to any statement of any evidence as given you by any lawyer or by me in my charge, it is your recollection of what the evidence is that governs. In that connection I will also charge you that if you have, you who are the tryers of the fact, have any concern about what that evidence was, have the transcript read back to you, you can have the movie played again so you can refresh your own recollection as to exactly what the evidence was so you will have no question about it.

Go ahead, sir.

MR. BUCHWALD: The reporter asks:

Are you talking about murder?

Kelner: I am talking about justice. I am talking about equal rights under the law, a law that may not

exist, but should exist.

You remember the character witness, Arthur Miller testifying yesterday, about his view as a lawyer of eight years that it is all right to assault a man as long as you disagree with him strongly enough, about the higher justice.

Ladies and gentlemen, even though that may be a silly idea, just to say that, just to say it is your opinion that there is a higher justice and you can assault people who you want to because you disagree with them, that is just the expression of an opinion. What is not the expression of an opinion is that first statement. We have people who have been trained and who are out now and intend to make sure that Arafat and his lieutenants do not leave this country alive.

That is a threat clear and unambiguous.

The reporter asks again:

Are you saying that you plan to kill them?

Kelner responds:

We are planning to assassinate Mr. Arafat just as if any other -- just the way any other murderer is treated.

We are planning to assassinate Mr. Arafat, clear and unambiguous.

The reporter asks:

Do you have the people picked out for this?

Have you planned it out? Have you started this operation?

Kelner: Everything is planned in detail.

The reporter: Do you think it will come off?

Mr. Kelner: It is going to come off.

The reporter: Can you elaborate on where or when or how you plan to take care of this?

Kelner: If I elaborate it might be a problem in bringing it off.

Ladies and gentlemen, the WPIX interview of Kelner continued even after the film ends, but that portion of the film during which there is sound, this portion (indicating) is continuous, uninterrupted, unedited and as and when you view the film again for yourselves you will see there are no other reporters asking questions simultaneously, only Mr. Miller who testified here.

Now, after the film which you saw there was more film which was not telecast, which was edited out so the story could be fitted into the time allotted for it on the WPIX news.

It is during that final portion of the interview you will recall from Mr. Miller's testimony that Kelner explained that the people he had been talking about had been trained at that JDL camp in the Catskills.

Ladies and gentlemen, that film isn't out of

context. It hasn't been finagled with. The defense can call witnesses. They have subpoena power just like the Government and if it was out of context, ladies and gentlemen, they could have called here to testify any of the other newsmen who were there, any of the three other members of the WPIX camera crew, the WPIX film editor, they could have subpoenaed the film that was edited out, but they didn't.

Ladies and gentlemen, with that basic review of the evidence -- let me focus in --

MR. DECHTER: I'm sorry. Your Honor, I must object. At this time I do believe at this point there must be a side bar regarding the comments just made. It is not the law.

THE COURT: No, I deny the side bar.

Go ahead.

MR. BUCHWALD: With that review of the evidence let me focus in and I hope not to make this too much longer on two particular issues. Was the WPIX telecast a communication in interstate commerce? That is No. 1.

No. 2, were Kelner's words on that telecast in fact threatening. Did he intend them to be threatening. That is the key question. Not did he intend to carry out the threat, did he intend them to be threatening whether or not he actually intended to carry them out.

As to question one, the interstate commerce question, you heard that the film was telecast on WPIX channel 11 on November 11th. WPIX is licensed by the Federal Communications Commission. It has a broadcast range which enables it to transmit into states outside of New York, including New Jersey, Connecticut. The film was seen on the 10:00 p.m. news at the studios by both Mr. Miller and Mr. Marcovsky who testified. It was seen over television by Mr. Milaccio of the FBI who testified.

Miller and Marcovsky both testified to having seen WPIX programs while viewing channel 11 from outside New York State including the 10:00 p.m. news program.

On this point there really isn't any dispute, is there? I ask you to listen carefully to his Honor's instructions on the question of what is an interstate communication.

As to question two, is it a threat or just the expression of a strongly held opinion? Did he intend to convey a threat?

As to this, ladies and gentlemen, if the words themselves and the way in which they were said was not enough and the fact that the gun was put on the table with the express purpose of having his words taken seriously, if that wasn't enough, I submit to you that the defendant's

own testimony was tantamount to a confession on this point.

He didn't utter those words by accident. He intended to say what he said. He knew what he was saying. He knew that his words sounded like a threat; that they appeared like a threat; he said it was a performance, an act intended to create an atmpsphere. He wanted the words taken seriously. He didn't want it to be treated or thought of as a joke.

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He knew that a PLO spokesman had been assaulted and hospitalized in New York the month before and that whether or not that had been done by the JDL, the fact of the assault would give credibility to the threat.

He knew that the appearance of the gun on the table would give credibility to the threat and it was precisely to give such credibility that the gun was put there in the first place.

He knew his own high position within the JDL and his reputation for efficiency would give them credibility. His words were intended, they weren't coerced from the press, ladies and gentlemen. He didn't appear nervous.

Do you remember Mr. Miller's testimony. He spoke, as Mr. Miller said, in a conversational tone. There didn't seem to be any extraordinary stress.

Ladies and gentlemen, you saw him testifying here. Was he not cool and composed and articulate in a most stressful situation.

Was he not in complete control of himself? Was someone able to put words in the mouth of Mr. Kelner here?

Ladies and gentlemen, he admitted here it was not really an exaggeration. He didn't intend to

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carry out the threat, but he said what he said, he knew what he was saying, he meant it to be interpreted seriously. He didn't want the police or the FBI or the Secret Service or the television audience or the PLO delegation to think it was a joke.

There was, in fact, he says, no real plan to carry the threat out. As I have pointed out before, that is not really the question.

He said there was no plan, no plan could have worked. It would have been futile so there was no plan. He felt a sense of frustration by this, he said, but he intended to say what he said, convey what he admits was an apparent threat and which measured by any objective standard most certainly is that.

To quote his own testimony from page 260 of the transcript in response to Mr. Dechter's question yesterday afternoon, not this morning, after the overnight period:

"As I said before, the words were the words of a threat, but at that particular time there was no followup being planned." He didn't intend to carry it out, but the words were the words of a threat and were so intended.

Ladies and gentlemen, I think I have gone on long enough. The task of determining the guilt

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or innocence of a fellow citizen is always difficult and that may be particularly so here, where most, if not everyone here, share at least that part of Mr. Kelner's views which pertain to terrorist acts of the PLO.

Just please remember again that the law applies across the board; it protects everyone.

Consider all the evidence. Consider it calmly and as dispassionately as you can. Apply it objectively and fairly, withouit prejudice or bias to the instructions on the law which his Honor will give you and if you do that, ladies and gentlemen, you will have done justice above all else to the rule of law itself.

Thank you very much.

MR. DECHTER: May it please the court, Mr. Attorney Buchwald, ladies and gentlemen of the jury:

I could at this time smile at you, look at you, wink at you. It is much too serious. I take this particular trial as one that is unique. It is not only unique in terms of Mr. Kellner, because of course Mr. Kelner is the most important individual we have to consider, it is unique in very many aspects that you must consider.

It is unique in the fact that this is a political

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trial and you must remember that in the context of what a political trial means.

It is my contention from the beginning that the United States Government, with the full intention, premeditation, with all their resources, intended, no question about it, to try to destroy Russell Kelner, a man of an unelemished record and achievement.

Why? Because we have in Mr. Kelner a unique situation, a man of superb knowledge and commitment.

Mr.Kelner is, of course, an officer of the Jewish Defense League, office manager, not a soldier. Not one who is involved with karate, an office manager. But a man who is a deeply concerned Jew, as I will tell you, so am I.

I am concerned because I am not only a lawyer here, not only an advocate, I am concerned for the lack of world opinion, the indifference to the tragedies of the Jewish people over a millenium. The fact that Ma'alot, Munich, Lod, where Puerto Rican pilgrims on a missionary visit were murdered in cold blood by the PLO. It is a murderous organization of gangsters, out and out killers, who would desecrate our shores.

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Yes, I do believe people have the right of freedom of speech. Yes, I do believe that if I disagree with somebody, even in the strongest terms, the other person has rights too. They can express an opinion in a free society. That is what democracy is about. That is what the Constitution and the First Amendment talk about. What are we saying about freedom of speech? My contention and my statement is that that is what Russell Kelner did. Nothing more and nothing less, expressed indignantly, expressed with full heart, expressed emotionally, expressed with shock and dismay that the rest of us, who are not as strong as Russell Kelner, could not get up and do what he did.

What did he do? He expressed his indignation. That is what he did.

He said, if you remember his testimony, that he was speaking for the the World Jewry. In a way he was right because no one in the world, certainly the United States, certainly in Jewish organizations, certainly in non-Jewish organizations, had the integrity to state that this murderer, who was wanted for murder by the United States Government for murdering a U. S. ambassador at Khartoum, this man was ignored.

Imagine landing at Kennedy Airport and I didn't see the U. S. attorney or the FBI or the Secret Service, the state police, the city police, Army, Navy, did they come down and arrest Arafat? It will be a question for you to decide what happened, when and why. No, nothing was done. Why?

It is a material question of being Jewish. Why? Leave it at that.

But we do not leave it just on the history of the Jewish people. What happened in all these tragedies because there would never be a group called the Jewish Defense League if there wasn't a vacuum avoiding by other organizations who never had the integrity in the 1930s and '40s of speaking out strongly and demonstrating within the First Amendment, and peacefully marching and demonstrating with slogans.

Of course, if that was true, anyone who remembers that period or reads the history of the period would know , would definitely know, that there was no question that we could have saved millions of people. No question of what could have happened if people would have spoken out. Because in 1955, in Montgomery, Alabama, the Reverend Martin Luther King, a martyred man, spoke out. He started demonstrations in

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the United States which was called the black revolution. He spoke out and he accomplished his task and only God knows what he did because he did great work.

I pride myself in having some contact with that particular position and working that way.

He spoke out and sometimes members of his group, and right until today people speak out, discuss in total frustration in their miserable situations that go on. The civilized behavior of man to man they speak out.

Can we say that any one of us, madam, yourself, can we say that you have never seen a program?

Yourself, sir; you, sir; madam, yourself, have you ever seen a program that a person didn't get on a television set at a news broadcast and in total frustration and anger said, "I'm going to get my boss." Specifically, people have been laid off because of the economic situation we are in today. I remember a broadcast of three weeks ago, people laid off in Pennsylvania where a man said on TV --

THE COURT: That is sustained.

MR. DECHTER: In other words, are we not saying that there is selective prosecution and persecution here?

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We must direct yourselves to this particular case. I believe that one of the parts the United States attorney -- I'm sure the judge will instruct you on the law -- happened to ignore is the fact that the burden of proof is strictly on the prosecution. That's where the burden is. It's on the prosecution.

I have nothing to prove. I didn't have to make a statement. We did not have to do anything but sit there. We could have sat there and let you listen and let you decide. Of course we would have let in, if we allowed that, some misstatement of facts made by the prosecutor, so that the purpose here lies strictly with the prosecutor. He must prove his case beyond a reasonable doubt and to a moral certainty.

The judge will go into that in detail.

Further, the law commands, it is part and parcel of our penal law and procedure and our Constitution, that the presumption of innocence stays with my client, Russell Kelner, a man who I admire and a man who is a Jew with a heart. It stays with him. It stays with him through this trial. It stays with him through this moment. It stays with him when you

walk out. The presumption of innocence is his. You cannot take that away from him. As of today, 3:35, this is a country of law and we are going on law and that presumption of innocence must be overcome by a definite production of evidentiary matter over and above to show that my client, Mr. Kelner, was guilty.

If not, if there is the slightest hesitation in your mind, if you have some doubt as of this moment, you have no alternative but to acquit him. That's the law. That's simple. It's the law. The presumption of innocence, that's what it's about.

Burden of proof, the prosecutor must prove his case beyond a reasonable doubt. Every element of this crime must be proved beyond a reasonable doubt.

Let me remind you of the indictment:

On or about the 11th day of November, 1974, in the Southern District of New York, Russell Kelner, the defendant, unlawfully, wilfully, and knowingly transmitted and caused to be transmitted in interstate commerce a communication containing a threat to injure the person of another, to wit, assassinate Yasir Arafat and others associated with him. Title 18, United States Code, 875.

If that is true, that he did, in no way

did the prosecution prove the elements of this crime beyond a reasonable doubt and to a moral certainty.

I will give it to you slowly -- wilfully, unlawfully and knowingly transmit. The only reason I do it this way is because you do not have the indictment in front of you.

Lawfully, wilfully. Was it wilful? Was it knowingly transmitted? That's one of the three elements you must consider.

Wilfully? We are talking about intent, because in every crime, from the lowest crime to the most difficult one, one right here in the federal court, intent must be shown. Without intent you have no crime. There is no way you can convict someone without intent.

So that it has definitely established, as far as the defense goes, that the question of what he said, we do not in any way deny a session pulled out of context shown on the screen. We have never denied that. As a matter of fact, I agreed we would allow, and I stipulated that it was not even necessary, the picture. I felt it was inflammatory. We allowed it. We said that it would be fine, that as far as we are concerned, he said what he said. What

he said, though, has to be taken in toto. One doesn't walk into a room and there is an argument going on for a half hour and jump in on 55 seconds and make a decision: this is what he said. Anyone can do that. Anyone can grab out a section and say: Look what he did.

What happened before that? It was part and parcel of a situation.

If you will recall the testimony, and I am sure you do, the reporters were there for a half hour. Do you know what they showed you? Fifty-five seconds. Fifty-five seconds out of a half hour. I'm not a good mathematician but that comes out to 00.6 of one decimal point. Is that what they did? Did they give you the totality of this? Was it accurate of the prosecutor to claim that Mr. Kelner made this statement and that was it? He didn't know what was going on before. Let me show you.

I have before me three subpoenas. If the defense had information otherwise that there were other clips, which of course there were, what were they doing there for a half hour? Having a singsong, a folk song festival going on? They are asking questions.

MR. BUCHWALD: I object.

THE COURT: Is this in evidence?

MR. DECHTER: I received this today.

THE COURT: Is it in evidence?

MR. DECHTER: I offer this in evidence.

THE COURT: The offer is denied at this time. The objection is sustained.

MR. DECHTER: I will state to you that subpoenas were served --

MR. BUCHWALD: Objection.

MR. DECHTER: On all three programs.

THE COURT: Sustained.

MR. DECHTER: There is a question, your Honor, what the defense did or did not do. It becomes a question of fact and I have the facts here to prove otherwise.

THE COURT: Objection sustained.

MR. DECHTER: Because of extraneous situations there are reasons why the different programs are not here.

The fact is that Mr. Kelner strictly answered questions based on a conference which, to the best of his knowledge, he did not call, that he personally called. I don't know who called it.

There was no such testimony as to the name of the person who did it. I assume he didn't know it.

What he responded to, Exhibit 2. I show it to you again. It is in evidence. I read it to you:

"Advisory 11/11. Jewish Defense League holds n news conference to allege threats have been made against Jewish Defense League by PLO, 1133 Broadway, at 26th Street, Room 1026, 8 p.m., UPI New York."

Let me point out that at the time I was asking questions I was not aware of this particular exhibit and therefor once I became aware of it --

MR. BUCHWALD: I object to that, your Honor.

THE COURT: Go ahead.

MR. DECHTER: Once I became aware it was entered into evidence by the prosecutor. We go over it and it is obvious what JDL was doing. They were protecting themselves from PLO. There were no threats. It is simple why they would have people out there. Well, if someone could come into your home, madam, and say they aregoing to assassinate you, if you could not get to somebody else, wouldn't you have your husband standing outside or standing by the door? What is unusual about that?

The fact that some young men today wear khacki, what is unusual about that. That is standard clothes by young people today. Maybe I should adopt the uniform of plain average people. I am a little too old for it. Dungarees seem to be the outfit today. No more suits.

Well, these men were there. What did they do? They escorted people into an office where statements were made. How many people? It is testified about eight. It is a small room. This was testified to. It is not a large room. Eight people in that room, I imagine, would be a lot of

pgrf 2

people if it included Mr. Kelner. People, everyone on top of each other.

I have observed and I'm sure you have too, when media, newspaper people, TV people, all asking questions at the same time, it is difficult to handle unless you are a professional. Mr. Kelner is not a professional personality. He does not know how to handle himself like a movie actor could handle himself. If there was a threat, if there was any intention of a threat, if this is what he wanted to get across, he would have had to prepare a statement, a Madison Avenue statement, which would have been prepared and he would have said, "Gentlemen, here it is," and that is it.

That is not what happened.

There was a half hour where he described the tactics of the PLO, and that was ignored, why? Because a reporter happened to come in near the end. He didn't hear it. That is possible. I don't question the truthfulness of any man under oath. He didn't hear it. He came at the end and said he was preparing a tape. I don't know in photography how it works but I do know there is preparation. He was not paying attention. He may have been a 16 year old boy. He couldn't care less what was going on. He had a job to do and he did it. Was he there to be an agent for the prosecutor's office? I don't know. Is that

pgrf 3

the case? He didn't listen. Is that what the prosecutor is basing his case on, what a 16 year old was doing in a room? And was he listening if he heard any remarks bearing on PLO? Of course not. There is no reason to believe that remarks were made by Mr. Kelner, and if I had the opportunity I could prove that.

I respectfully state to you it becomes one of whether you accept one or the other propositions.

When you think about this case, basically -- you will have that opportunity to think about it -- it becomes one whether it was a threat or was there an open exaggerated statement made by a dedicated Jew who was overwhelmed with his own situation at the moment. Was it one made in haste under emotional stress, under tremendous pressure regardless of what he looks like?

I happen to know this man. What he looks like doesn't always indicate how he feels. You cannot say because he stat there -- look at him. Do you believe for a moment this man is not nervous? Just because he sat in front of a TV camera could you tell what was going on in his mind? Could any of us know his body temperature? Did we take that? Do we know about his adrenalin? Did we measure it? No. He was upset and distraught and in that he made a mistake. You know what he made a mistake in?

pgrf 4

It is interesting. He made the mistake in a word. I think all of us weren't the best of students in English He made a mistake with regard to a sentence or a word, "In the event Mr. Kelner, even if we were to accept any of this, which I do not" -- there was no threat.

If he would say instead of "Well, we will assassinate," if he would have said, "We should have assassinated," or some brief word like that -- one word and you are going to deny this man his liberty!

eorf 5a pm 1

Is that what is going to happen because of a man's word? The interpretation of a word. The interpretation of what he meant. I think you are too intelligent for that.

You had the opportunity to observe him. I have been in many trials and believe me I find this a most interesting jury. I am happy to appear before you and that is not playing up to a jury. The fact is that is the way I feel in my heart. I have not always had that opportunity.

I say that an intelligent jury of diverse backgrounds, of different life experiences, of every day living makes a decision not only on law, because you are not lawyers and you couldn't possibly expect to understand the law and understand the ramifications of the law other than what the Judge tells you and within the limitation of time that you have you must use judgment.

If you recall, the Judge admonished you from the beginning that you know that you do not let your life experiences remain out of the door. You don't come here in a vacuum. Madam, yourself, you have brought your life experience, joys and sorrow. Madam, yourself, sir, where you know that in life experience as one judges the total context of a situation, you don't make it on what you think he meant.

What do you think he meant? I don't know what I

eorf 2

think he meant. I know what he intended because if that was his intention to create a threat, does a man in his right mind go on television and say, you know, hey, Mr. Arafat, you are a nice fellow, but I happen not to like you, but, you know, I am going to assassinate you.

Do you believe that? The prosecutor wants you to believe that. Would you go on television to tell him to his face where he works, it was known what his name was, he is a man unfortunately because of the prosecutor's position and the United States Attorneys and the whole gamut of law enforcement in this country, at this point because this is a group of Jews who have the guts to talk out and say that not another Jew should die. They want to do away with this kind of organization as they have done with other groups throughout America.

I say they would do that only by repressive law and I consider this a repressive law.

A man, of course, cannot just shout out and say what he wants to say or make a threat. That is obvious.

Imagine the prosecutor telling you, every one of you knows where to stop. He doesn't have to tell you about that. That is just common sense. You do not threaten someone otherwise it is a violation.

Whether it is a violation of a local law, a state

eorf 3

law, a federal law becomes a question of what statute we are talking about.

In this statute that we are talking about we are concerned whether there was wilfulness, whether it was transmitted and for the U.S. Attorney to just ignore or try to kid you into believing, that is not important, I mean it is a specious argument. It is not a specious argument, it is an argument, one you must consider and one you should consider. Certainly Mr. Kelner made a statement, admitted, but what a bad example, how ridiculous can we get for the prosecutor to try to tell you, you are too smart for that, you are too sophisticated, that you take a letter and you go -- a letter which is in any way threatening or illegal and you go over to a box and you mail it and therefor, since the post office delivers it, therefor you try to imply, he said it openly, and isn't that equal to a threat? After all, WPIX is equal, as an example, equal to the post office.

You know why I believe he said that? Because I do not know of one case, if you think about it, that any man has ever been arrested under this statute, any man at all.

MR. BUCHWALD: Objection.

THE COURT: Sustained.

eorf 4

MR. DECHTER: I state to you that making statements on television is not something that is done by phone, which is transmittable, not something that you mail, which is transmitting. There is no such thing.

There is no crime here. There is no statement. There is no intention. I am surprised and shocked, not only with the trial, with the wasting of time and money of this trial, but the fact that there was ever an indictment here. I shouldn't be, I have been in criminal law for many years, maybe I shouldn't be, but I am surprised in this case that this was worthy of an indictment.

A man's word is protected by the First Amendment, entitled to make statements, strong statements which Mr. Buchwald, the prosecutor, which he said strong opinionated statements. Where do we draw the line between strong opinionated statements and the statements he made?

Are we going to say that because there was some word out of context, assassinated, are we going to say that words were put into his mouth which he was answering. He was told, he didn't say he was told. Let me quote accurately.

"Reporter: Do you plan to do that? Are you going to kill him?"

Answer by Kelner: "I am talking about justice.

eorf 5

I am talking about equal rights under law. Under law, a law that may not exist, but should exist."

He meant the law that doesn't exist many times in the cases of Jews and other minorities. That is what he is talking about. If he would have been able to gather his thoughts at that moment.

Does that sound like a man who is making a threat? Or a man who is concerned about civil rights, a man who is concerned about his right of freedom of speech. He s talking about justice.

Imagine him talking about justice when it comes to a man like Arafat. It is so ridiculous because is there a justice for an Arafat? Is there any man in this world who is sane who could accept a low murderer and killer of innocent children at Ma'alot, at Munich, Shemona. Do you want to go on? Murderer, gangsters. They won't fight with an army. They would fight against civilians, destroy airplanes, hijackings. Send bombing letters to civilians under the direction of Arafat -- Arafat is synonomous with Hitler. Attila the Hun, murderers.

Haven't we advanced? Haven't we learned? Are these people to be let alone with impunity? Don't we have an international court of justice? Did it ever come about for anyone to think that why in heavens name

eorf 6

do murderers like Arafat, why they are not arrested and brought to justice for crimes against the United States and humanity.

It is politics, oil politics, money, the name of the game. Jews are expendable. Not to us and that includes me. That is why I am here. We are proud to be here because of the fact that we are speaking out for the first time in 2,000 years while other groups have been doing it for years and they have every right and I commend them for it and I am proud of them for doing it.

Speaking out. where do we draw the line? An emotional person who made some statements. So, is that the reason why you would deprive a man of his liberty? Is that what we are talking about? Is that the reason why you cut short a man's life, a 33 year old man who has a family, a mother sitting in court here, his father. A mother who has seen the horrors of nazi murderer. He knows what that is and so do I.

This man is a man of conscience no less than the Reverend Martin Luther King or Casals, men of peace. He is a mild man, a peaceful man. It doesn't mean that he is a man who could just be trampled on just because he is mild and peaceful. Let's remember he had character witnesses come into this court. They weren't under his direction.

eorf 7.

These people weren't told what to say.

You could see by their answers and their demeanor, you could see what they thought of this man, people who knew him personally.

I could not possibly be more careful in what I say than what the learned Rabbi Wolf stated because in his own decent way and his own simple way he eloquently made statements which I believe is the crux of the matter.

Rabbi Wolf stated: By the way, Rabbi Wolf is an interesting man besides being a rabbi. A member of the Community Planning Board, if you recall, on the Community Planning Board, also of the 66th Precinct Community Council, Subway and Law Enforcement Group of which he is a volunteer. He stated about Mr. Kelner: "He has a big mouth, but dogs that bark don't bite."

Further, that Mr. Kelner is a sensitive, reliable, truthful man. He opens his mouth, that is about the extent of his unpeacefulness.

That is about the way I know him. I have never seen this man act any other way.

MR. BUCHWALD: Objection, your Honor.

THE COURT: Yes, sustained.

MR. DECHTER: He is known by the witnesses who were here who were asked direct statements about his peaceful attitude. Each one of his character witnesses, which you must consider and which the judge will instruct you on the law regarding that, a most important issue because if we just prove the fact that character evidence here is very much in place, that if you prove and if I prove that Mr. Kelner's character is so unimpeachable,that and that alone creates a reasonable doubt as a matter of law. The law is based upon good, solid foundation of hundreds of years and really is based upon Talmudic law, and law based upon that going back 5000 years.

His character witnesses all stated just about the same thing. Not the same words. Right away I will be accused of saying the same words. They stated that basically he is a peaceful man, a mild man, but a deep man.

One has to decide and decipher what was done here. One has to decide whether there was a threat. A threat.

Couldn't one see through this whole thing?

Couldn't one see that even though this is a new Jew, this is not the new Jew who is violent because we are not a violent people. It is not what he intended. There was no threat. Couldn't you see that it was all staged? Wasn't that obvious? The emphasis by the prosecutor, of course, a gun, a man standing there, uniform. What else could he say?

Does that indicate a thteat or his that a prop? I say it was part of the total kind of portrayal. If one looks at it in its totality one could see that it had no more significance in the statement than to actually alert, you know whom, not even those, Arafat. In no way Arafat because Arafat, it was known, was to be in New York a short 20 hours or so. Certainly I don't think he understands English if he understands anything. A man who carries a gun into the United Nations.

I didn't see the U. S. attorney saying let's arrest this guy.

Imagine the atrocity of it all, the irony. A gun, a prop. One that could not even be used. One that was inoperable. There was no question about it.

It is also to be considered that with the

excellent character of a man who has such a fantastic reputation, such an education, the head of a department at the age of 26; languages, Spanish -- Spanish language department at the age of 26 with 10 teachers underneath him. A man obviously with skills who people trusted, his character was unassailable. Because if it wasn't -- did the prosecutor bring anyone here? And they have all the resources, you cannot even imagine the money and the finances that they have to bring people in, which they have a right to do, it is a part of our government services. He could have brought anyone in to rebut, to show that something was wrong with this man's character. He had a right to do that. They do that in every trial. Yet he didn't do that.

No question of the man's character. Perfectly nice, decent man. No question about it. It doesn't require another comment about Mr. Kelner.

As far as his statements even on the stand, this man was uneasy, this man was upset, he never really had this kind of an experience because he has never been convicted of any crime. He never had an experience of this sort.

He couldn't literally give you the answers

that would just close this case in 20 hours. He said some things that he did not mean, in no way, because we quote the testimony, we know he stated, when he was asked whether he had no intention to threaten anyone nor to carry it out --

THE COURT: Mr. Dechter, are you going to be much longer? You asked for 45 minures.

MR. DECHTER: Your Honor, I am sorry. I may have to go on for another 15 or 20 minutes. I couldn't possibly predict the time.

THE COURT: Confine yourself to 15 more minutes, please.

MR. DECHTER: I am sorry, your Honor, it will be very hard to confine myself. I will try to sum up the best I can.

As far as speculation, it seems that the prosecutor constantly speculates, what he would do, what he could do if he had an opportunity to do it.

Let me ask you this, sir: At a chance, you -- sorry, sir -- had a chance to get at the Imperial Wizard of the Ku Klux Klan --

MR. BUCHWALD: Objection, your Honor.

THE COURT: Yes, sustained.

MR. DECHTER: What does one do if you had

eoa5

a chance? That is what the prosecutor was talking about, what he thought he would do if he ran into a Ma'alot. Imagine walking down 42nd Street -- it's too ridiculous -- to walk down 42nd Street and say, "Hello my friend Yasir, you are here." Unbelievable. He is not going to run into Yasir Arafat. You don't run into Hitler unfortunately.

How would one react? How does one know how you would react? The murderer of women and children and possibly relatives, directly and indirectly, because the Jewish people are one of this man. How does one know -- one doesn't -- how we would react? But that is not at issue. It is not an issue at all.

At issue is what he stated and what he stated is not what he meant, that is all. Because if he didn't mean it, it doesn't mean anything. You can show that film from now till Sunday night, repeat, repeat it and repeat it, look at the film; it's an interesting film, it takes 55 seconds. I don't see the interest.

What does the film show? He didn't mean anything by it because, again, no sane man gives you a warning, even if he doesn't need his name. He tells

you his name, he shows you his face, you stand there in an office that is located in mid-Manhattan, 1133 Broadway, known to the public, to anyone who wants to hurt this man. Would he do that?

No question about his sanity. He is an intelligent man. What he was trying to do is to alert the Jewish public to the problems that they are faced with because the Jewish national organizations have not been doing their job, to alert them to what the problems. That is what he was trying to do.

He overstated it. He was bombastic. You know what, he was even priming himself, he was puffing. Maybe he can't say it, but I will say it, because that is what he really was doing.

He was puffing. Maybe he was boosting. Any one of the synonyms you want to use.

Was that a threat? As much of a threat as you would use, madam, to your child throwing over a vase, an expensive vase, that you went to Spain to get. A child throws over a vase, it falls and shatters, "Oh, I don't believe it. I will kill you. I will kill you." Does that mean you will kill him? Do you want to kill your child? Is that

eoa7

what it meant? Did you threaten your child? You should have been arrested for it? All of us would have been under arrest.

As a matter of fact, it's ridiculous, isn't it when you think about it from common experience. As a matter of fact, the day of Arafat, do you notice how many -- I would imagine, taking a guess, the New Yorkers watching WPIX, no one had anything to do that day but we all watched WPIX that night at 10 o'clock, eight million people watching it according to the prosecutor, everyone watched this.

Certainly Arafat, this man had nothing else to do. All he wanted to do was put on the television set and watch Mr. Kelner. He was concerned about Mr. Kelner. He knew this man existed. Today I am sure he doesn't even know he exists.

He watches the broadcast and that is a threat. Ridiculous. No more of a threat than anything else that you say in a day to your friends, associates, whatever. Someone is pulling away in a car and he threw some dirt on your lawn that you just newly took care of. You coulnd't possibly mean it, the man is down the block: "I'll kill him, I'll kill him." Arrest him, arrest that guy; it's harass-

ment, it's aggravated assault, it's whatever, attempted assault. Arrest him? He didn't mean it. Whether he meant it is most important.

The crux of this argument is whether his intent -- what I mean by that is his intent, what was his intention here? What are we talking about? Intention, what are we talking about as far as intention goes? Aren't we talking about,as far as intention, what one wants and plans to do? Isn't that what we are saying? Isn't that what we are saying?

I am not talking about whether he could have carried it out because it was conceded that he could not have carried it out by the prosecutor, who has conceded that already. The security measures were unbelievable. In fact, unprecedented, quoted by the press. Unprecedented, Khrushchev, Brezhnev, a lot of unimportant people, only Arafat is important. To whom? To the oil billionaires?

When one considers the life of this man, the future, what happens to this man, his family, his friends, myself, his lawyer, we are concerned. I am sure you are concerned. You are concerned about justice and fairness for every man who is on trial. You are here sworn to be impartial, to not

be prejudiced, to keep any of your personal feelings out of this. This has to do with the totality of what you have seen and what you know to be believable.

Could you not believe the kind of man this was on the stand? Is this the kind of looking man, direct your attention for a second if you can, is this the kind of man who is going to threaten somebody? Who is really going to hurt somebody? Is he going to do that?

I don't think you are going to buy that. Nothing the prosecutor said is going to make you buy that.

I know we covered it. Every one of you know about this Arafat. But you know, there is an old Indian expression: Unless you are in someone else's shoes you don't know how it feels, you don't know the experience of it.

I'm not in someone else's shoes and they are not in my shoes. They don't have my hurts and I don't have theirs. The Jewish experience of total murder and slaughter 30 years ago, six million Jews --

MR. BUCHWALD: I object, your Honor. I certainly will object to the display of newspaper articles or whatever Mr. Dechter has in his hands.

MR. DECHTER: I have not done anything else but have something in my hand.

THE COURT: Objection sustained. Let's see what happens to what is in your hand.

MR. DECHTER: I don't have to have anything in my hand. This could be blank pieces of paper. I am sure the prosecutor could not be serious.

What do I have in my hand? I have here total terror, carnage and murder, Ma'alot --

THE COURT: I will sustain an objection to that.

May we mark that as an exhibit.

(Court's Exhibit 2 marked.)

MR. DECHTER: I don't have to show you the pictures. You know them. I don't have to show you this. You know what it is. You know the famous picture --

THE COURT: If it is not in evidence there will be no reference to it.

MR. DECHTER: I'm not showing it or referring to it.

THE COURT: Go on to something else.

MR. DECHTER: You know by what you read that it's a terrible situation. This is what he reacted to. It is not a threat but to alert the citizenry of the world that we are dealing with a contemptuous, low person and to speak out, to speak out his experience, to let the world know where the younger Jews of today have taken a stand, as many other groups, Spanish, Puerto Rican, black --

THE COURT: Mr. Decker, I'll have to ask you to conclude within five minutes.

MR. DECHTER: I state to you that there

is no evidence here, none, that is believable because none was put on. When you think about it, what was put on here? A film. Of what? Fifty-five seconds out of a half hour? Is that what you are going to base your case on? I know you'll reject it.

I have stated -- maybeoverstated at this point -- the beyond a reasonable doubt theory. It stays right into the jury room. You will have to consider in your mind with your deepest conscience, every one of you -- you, sir, this lady, this lady over there, madam, yourself, this lady, this lady, you have to consider, Madam Foreman, this man, this gentleman, and you, the gentleman here, you have to consider in your deepest heart, your conscience, whether any crime was committed.

This was not a crime, speaking out. That's the most ridiculous thing in the world.

As Rabbi Wolf stated, in his Crown Heights community they thought it was a joke. The are used to being mistreated in some of these areas. That's all it was, the whole thing was a joke. I hate to admit it. Even the actions of Mr. Kelner, that was a joke too. He didn't mean it. He was puffing. For this one they would proscribe and try to limit his

freedom?

It's interesting for the prosecutor to be concerned about this murderer walking around.

Was he concerned about the rights of freedom of speech of Mr. Kelner? I didn't hear him say that once. That's another thing. He's only interested in Mr. Arafat as if Mr. Arafat wanted to walk down Fifth Avenue and take a stroll. Is that what he wanted to do?

If we are going to arrest based upon the feelings of people, we would have to arrest half of New York or maybe the rest of us. Our minds and thoughts are our own. We live in a democracy and just because we speak out and we have deep thoughts and we may even have dreams -- maybe they are not the best dreams, but we have dreams -- does that mean you will go out and do it?

The burden stays with the prosecutor. He has not proven his case. He has shown you a film. So what? What does the film prove? Nothing. The film did not prove that this man committed a crime beyond a reasonable doubt and you have a responsibility, you have a responsibility to yourself, for the rest of your life. You must life with this. You can possibly ignore it -- I'm sure you will after you go to the jury room and make your deliberation whichever way it goes.

No matter what happens you can forget this, but this man will never forget. The tribulations he has been through these months, Mr. Kelner, my friend, he will not forget this situation. You can forget about it, I'm sure, in a couple of months, a couple of weeks, whichever way it goes.

You have to sit with your conscience and deliberate each one of you as a judge. You cannot be influenced by someone else here. Talk among yourselves but you should have individual thought. I'm sure you will be so charged by the Court.

Each one of you is a judge. You should not be influenced even if 10 of you or 3 of you would try to influence the other group. If you believe that this man has not committed this crime beyond a reasonable

pgrf 2

doubt you stick to your belief because that is what you are going to do. I know that by watching you and listening to you.

THE COURT: Conclude in two sentences, please.

MR. DECHTER: After you sit down quietly in the confines of the jury room and you discuss this case, you are going to have an opportunity, after listening to the instructions of the Court as to the law and apply it to the facts, you will see that the prosecutor in no way proves his case beyond a reasonable doubt as to wilfulness, knowingly transmitting, when he spoke into a mike -- and he had nothing to do with putting it on, he could have done what they wanted -- and caused to be transmitted in interstate commerce a communication containing a threat to injure the person of another.

I submit to you, to your deepest judgment, to your deepest conscience, to your heart, to your soul, when you think about this, deliberate, think about the total situation, think about this man, and what could happen. I ask you after you deliberate, you have no other position to take, the people have not proven their case, the presumption of innocence stays, and you will bring in an acquittal and a not guilty verdict.

Thank you very much.

pgrf 3

MR. BUCHWALD: May it please the Court, your Honor, counsel, ladies and gentlemen of the jury. I promise not to take more than a few minutes.

I want to remind you again of the crucial element. Did he intend to convey the threat, not did he intend to kill. Listen carefully to his Honor's instruction. That will be the next portion of the trial, the next thing you hear.

Mr. Dechter raised the question about saying in anger to your child "I will kill you." I suggest that is a far cry from calling a press conference with the express purpose of conveying a threat with the intent -- the intent -- that it be interpreted seriously and not as a joke.

Mr. Dechter suggested to you that your function was one of perhaps denying someone his liberty.

Ladies and gentlemen, you are the judges of the fact. You judge the facts ,you apply it to the law as his Honor will instruct you on it and you bring back a verdict in accord with your conscience based on the evidence.

So far as what the punishment in this case is going to be, if you should decide to convict, that is entirely a matter for his Honor. He can mete out any

pgrf 4

punishment from probation up to a sentence in jail.

MR. DECHTER: Objection.

THE COURT: Overruled.

MR. BUCHWALD: That is within his Honor's province.

Ladies and gentlemen, a final matter which I will address myself to only briefly: The accusation that this was a political trila, that the U. S. Attorney's Office had a great deal to gain by prosecuting someone who threatened to kill Mr. Arafat, ladies and gentlemen, I ask you in view of the relative popularity of Mr. Arafat in this community whether there is a great deal of political motivation in a prosecutor's office to prosecute here! You heard the testimony of Mr. Milaccio, the FBI agent, that before the prosecution would be authorized the prosecutor's office demanded to see a verbatim transcript of the telecast that went out over WPIX and wouldn't authorize the arrest of the defendant until it saw that verbatim transcript. I simply suggest to you that the notion that this is a political prosecution in which the U. S. Attorney's Office has a great deal to gain is simply wrong and in error.

Ladies and gentlemen, I have tried throughout to avoid, to the extent I could, any impassioned rhetoric.

pgrf 5

I have tried to stick as much as I could to the issues in this case. You are now about to embark on the final stage of the case and it is a difficult task. I ask you to be true to your consciences in applying the facts as you apply them to the law as his Honor instructs you, and to do justice, which I am sure you will do.

Thank you.

THE COURT: Ladies and gentlemen, we will take a very, very brief recess. By that I mean no more than five minutes before my charge.

(Recess.)

(Jury in box.)

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CHARGE OF THE COURT

THE CLERK: The court room door is locked.

THE COURT: Madam Forelady and ladies and gentlemen of the jury:

We are now at the point in the trial where you are soon to undertake your final function as jurors.

MR. DECHTER: Your Honor, could you be louder so we can hear or could we move up?

THE COURT: Why don't you move up, sir.

It is here that you will perform what I have earlier said is one of the most valuable and important obligations of citizenship.

In this connection can everybody in the jury hear me?

(Affirmative.)

THE COURT: You are here as I have said earlier to act as ministers of justice and to determine in accordance with the instructions that I give you on the law as to what the facts are in this case.

You are to do this, to discharge this duty in complete fairness and in complete impartiality. As I said when you were selected, you are to do it without bias or prejudice for or against the Government or for or against Mr. Kelner, the defendant, as parties to this

eorf 2

case.

You are to do it without letting emotion enter into your deliberations in any way, which can only interfere with your impartial consideration of the evidence you have heard from the witness stand and the exhibits in evidence. It is that evidence upon which you are to decide this case.

The fact that the Government is a party here entitles it to no greater consideration than that accorded to any other party to any litigation. By the same token, it is entitled to no less consideration. All parties, whether it is the Government, individuals, corporations or whatever, stand alike as equals before the Bar of Justice.

Now, in your final role in passing upon the fact issues you are the sole and exclusive judges of those facts. That is not my province.

You determine the weight of the evidence. You appraise the credibility or believability of the witnesses. You draw the reasonable inferences from the evidence that you think are warranted. You resolve such conflicts as you may find exist in the evidence and in doing this I will later refer to how you can be assisted in determining these issues and in determining any questions

eorf 3

of credibility that you may find.

My final function as the Court in this case is to instruct you on the law. Everyone agrees that this is a country of laws. It is your duty to accept these instructions and to apply them to the facts as you may find them.

Now, you are not to consider any one instruction which I give you standing alone as stating the law. You should take all of my instructions together as an entire whole.

With respect to any fact matter, any matter in evidence, it is your recollection and your recollection alone that governs what that testimony was.

As I have already said to you, anything that any attorney in this case has said with respect to any testimony whether during the trial, in a question, in an argument, in summation is not to be substituted for your own recollection of the evidence.

So, too, anything that I may have said or may say during the course of these instructions with regard to evidence or testimony is not to be taken in the place of your own recollection of what that testimony was. If you have a different recollection, it is yours that governs.

eorf 4

If you wish to consider any exhibit in this case, you have only to ask for it and it will be made available.

If you are uncertain as to any testimony and it is important to you, you may have that testimony read to you and if you wish to see the film of the news conference, that also will be arranged.

Now, before we consider the precise charges here, let me note a few preliminary things. I want to make it clear that neither the Jewish Defense League, the Palestine Liberation Organization or Yasir Arafat are on trial in this case. We are not passing judgment here on the relative merits of either or as to the worthiness or unworthiness of the goals or activities of either organization or its individual members.

A juror's personal views pro or con as to any public issues are totally irrelevant and should have no affect on your deliberations whatsoever.

It is Mr. Kelner who is on trial here on a specific charge and his guilt or innocence on that charge is a personal thing. The guilt or innocence of Mr. Kelner on trial must be determined by you solely upon the evidence presented against him or the lack of evidence, as the case may be, if you find that is relevant.

eorf 5

The charge against him will stand or fall on the proof or the lack of proof against him alone.

Now, there are certain principles which apply in every criminal case. I made reference to some of them at the time you were selected and I am going to repeat them now.

This indictment consisting of one sheet of paper, you may have that in the jury room if you wish, constitutes merely a charge. The indictment is no evidence or proof of the defendant's guilt and no weight whatsoever is to be given to the fact that an indictment has been returned against him.

He has pleaded not guilty to the charge in that indictment. That puts the burden upon the Government of proving the charge against him beyond a reasonable doubt.

A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charge contained in this indictment. This presumption of innocence was in his favor at the start of the trial, it continues in his favor throughout the entire trial, it is in his favor even as I instruct you at this moment and it remains in his favor during the course of your deliberations in the jury room.

The presumption of innocence is removed only

eorf 6

if and only when you are satisfied that the Government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt. Then it falls away.

Now, the question that arises is what is a reasonable doubt? The words almost define themselves. That there is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt that applies to your reason, judgment, your common sense and your experience.

It is not caprice, whim, speculation, guess, conjecture or suspicion.

Reasonable doubt is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after fair and impartial consideration of the evidence as a whole, you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt, in sum, if you have such doubt as would cause a prudent person to hesitate before acting in matters of importance to yourself, then you have a

eorf 7.

reasonable doubt. In that circumstance it is your duty to acquit.

If, on the other hand, after such impartial and fair consideration of all the evidence you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt, such conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt.

Under such circumstances it is your duty to convict.

One final word on this subject. A reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controvertible fact which by its nature is not susceptible of proof by mathematical certainty.

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As a consequence, the law in a criminal case is that it is sufficient that the guilt of the defendant be established beyond a reasonable doubt, not beyond all possible doubt.

Now, as you know, Mr. Kelner is charged with the crime of causing a threat to another, to injure another person, to be transmitted in interstate commerce. The indictment in this case reads as follows:

"On or about the 11th day of November, 1974, in the Southern District of New York" -- and I charge you that the Southern District of New York includes the Borough of Manhattan, which is called the County of New York, it includes the Borough of Manhattan -- "Russell Kelner, the defendant, unlawfully, wilfully and knowingly transmitted and caused to be transmitted in interstate commerce a communication containing a threat to injure the persons of another, to wit, to assassinate Yasir Arafat and others associated with him."

This single count of this indictment alleges a violation of Title 18, United States Code, Section 875(c) and Section 2(b).

Section 875(c), the main section with which we are concerned, reads in pertinent part as follows:

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"Whoever transmits in interestate commerce any communication containing any threat to injure the person of another" shall be guilty of a crime.

Section 2(b), the other section of the law involved in this case, states as follows:

"Whoever wilfully causes an act to be done which, if directly performed by him, would be an offense against the United States, is punishable as a principal."

Taking these two sections of the law together, in order to return a guilty verdict as to the charge contained in the indictment, you must be satisfied beyond a reasonable doubt that all of the following elements are present:

1) That on or about November 11, 1974, in the Southern District of New York, Mr. Kelner communicated a statement containing a threat to injure the person of another.

In this regard, as I have already pointed out to you, the office of the Jewish Defense League is located within the Southern District of New York.

2) That the defendant made the threatening statement wilfully and knowingly.

3) That on or about November 11, 1974

the communication containing a threat to injure the person of another was transmitted in interstate commerce; and

4) That the defendant wilfully caused the statement to be transmitted in interstate commerce.

The government must initially establish beyond a reasonable doubt that the defendant made a threat to injure Yasir Arafat and others associated with him.

A threat, as commonly understood, is an expression of an intention to inflict either injury or damage on another. In order to constitute a threat, a statement must be of such a nature as could reasonably induce fear.

Stated another way, a communication is threatening when the communication in its context would have a reasonable tendency to create apprehension that its maker would act accordingly.

It is not necessary for the government to prove that the threat was actually communicated to the threatened person or persons or that it had any particular effect upon the threatened person or persons.

Under the statute I charge you that a

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threat may be made by words alone for it is the forbidden utterance that is the criminal act and you must therefore judge the message which the words communicate.

In your deliberations with respect to this issue, you should consider the circumstances under which the statement was made and the context and surrounding conversation by the defendant and the reporter to whom he was speaking. You should also consider the specific language used.

I must caution you, however, that mere political hyperbole or expression of opinion or discussion does not constitute a threat.

If you find that the statements, if made, by the defendant were no more than an indignant or extreme method of stating political opposition to Arafat or the PLO, then you would be justified in finding that no threat was in fact made.

If you find that a threat was made, as I have defined it for you, and that the defendant made it, you must then determine whether the defendant made the threat knowingly and wilfully. It is clear that the question of whether the defendant did make the threat knowingly and wilfully is a very significant issue in this case.

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To meet the requirement of showing that the threat was made knowingly and wilfully, the government must establish beyond a reasonable doubt that the defendant comprehended the words he uttered, that he voluntarily and intentionally uttered them with the apparent determination to carry them into execution. For a finding of guilt is not necessary for you to find that the defendant actually intended to carry out the threat -- that is, the government need not show that the defendant actually intended to carry out what he said. It is only necessary for you to find that he intended to make the threat and actually made the threat knowingly and wilfully. What must be wilful is the threat. There must have been an intention to actually make a threat.

We all know that rough words can be used at times and under some circumstances without intending a threat. It is for you, the jury, to determine whether on November 11, 1974 the defendant, in saying what he said, intended a threat. That is, whether or not he intended the words as a threat against Yasir Arafat and his lieutenants, as the government contends, or whether he said those words as a statement of opposition to Arafat, their character and import some-

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what shaped by the reporters' insistence on a newsworthy story.

As to the precise words "knowingly and wilfully," I instruct you that the words knowingly and wilfully mean deliberately, they mean intentionally and with the free exercise of will.

The words knowingly and wilfully are opposed to an inadvertent or accidental statement.

I further charge you that if you find beyond a reasonable doubt that the defendant uttered a threat to injure Arafat knowingly and wilfully, it is no defense that the defendant acted out of what he considered to be an honorable or valid moral response.

It has been stated frequently that you bring into the jury box with you the common sense and experience of your daily lives. It is obviously impossible to ascertain or prove directly what is in the operation of a man's mind or the intention here of the defendant on the evening of November 11th. You cannot physically look into the top of his head to see what his intentions then were, but a wise and intelligent consideration of all the facts and circumstances shown by the evidence here should enable you to infer with a reasonable degree of accuracy what were Mr.

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Kelner's intentions at the time he made the alleged statement, assuming you find beyond a reasonable doubt that he made the alleged statement.

The intent involves mental attitude. With the knowledge of a definite act and surrounding circumstances, you may draw definite and logical conclusions.

In our everyday affairs we are continuously called upon to decide from the actions of others what their intentions are. Experience has taught us that frequently actions speak louder than words and that the circumstances surrounding an act or statement can give us insight as to the character of that act or that statement.

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Therefore, you may rely on the facts and circumstances surrounding the defendant on November 11th in determining his state of mind when he made the statement. Among those factors you may also consider the reaction to his remarks on the part of those who heard them.

As I said before, the significant factor is the defendant's state of mind which must be determined from all the circumstances surrounding the conduct of the defendant. You must examine all the evidence in determining whether the government has shown that the defendant knowingly and wilfully made the threat.

The third element, as you may recall my reciting to you, is that you must be satisfied beyond a reasonable doubt that the communication containing a threat to injure the person of another was transmitted in interstate commerce. Here there has been admitted into evidence, and you have viewed, a film which the government alleges was the film telecast over WPIX, Television Channel 11. I instruct you as a matter of law that a telecast over a commercial television station in New York which has a broadcast range which enables it to transmit into other states is a transmission in interstate commerce.

You, as triers of the fact, must be persuaded, however, beyond a reasonable doubt as to the elements of this offense -- that is, that the tape was in fact telecast on WPIX, Channel 11, and that WPIX has a broadcast range which enables it to transmit into other states.

The fourth and final element of the offense charged is that you must be persuaded beyond a reasonable doubt that the defendant wilfully caused the statement to be transmitted in interstate commerce. Let me repeat that: that the defendant wilfully caused the statement to be transmitted in interstate commerce. That's the fourth element you must find beyond a reasonable doubt.

The government does not allege that the defendant himself telecast the statement on WPIX. It relies instead on that second provision of the law which I read to you before which makes it a crime for one to wilfully cause an act to be done by others which, if he had performed the act himself, would have constituted a crime.

What does the term "wilfully caused" mean? It does not mean that the defendant himself need have held the camera or rolled the film or supervised or participated

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himself in any way in the actual transmission of the film over WPIX facilities. In the context of this case the term "wilfully caused" means did the defendant take some action without which the communication in interstate commerce would not have occurred. And -- I underscore the "and" -- did the defendant intend, know, or could he reasonably have foreseen -- did he intend, know or have reasonably foreseen -- that his statement would be transmitted in interstate commerce by others.

If you are persuaded beyond a reasonable doubt that he did, and if the answer to both of these questions is yes, then this element of the offense is satisfied.

I am not going to review the testimony for you since it was a short case and counsel have done it very well.

Nor will I restate the contentions of the parties since counsel on both sides have done that well for you also.

You are to consider all the evidence and all their contentions.

I have not referred to all of the evidence but I want to say firmly that all evidence, whether I refer to it or not, is in important. The fact that I have

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not attempted to review the testimony of the witnesses or have not commented on any part of the evidence is no indication that any of these have been disregarded by me or that I am placing any emphasis on any that I may have called to your attention in this charge. You may not assume, and you shall not assume, and I do not have any view as to the credibility of witnesses or how the issues are to be decided. That is solely your function as triers of the fact.

I want also to state that just because evidence is uncontradicted in the record you need not accept it if you do not find it to be believable.

How do you determine the credibility of a witness? That very largely depends on the impression that the witness made upon you. Was he or she telling the truth in giving you an accurate version of what happened? As I have said to you, when you walk in the door of the courtroom and you sit in the jury box while the trial is going on and while you are deliberating, you keep your common sense, your good judgment and your experience with you. You decide whether a witness has told a straightforward and truthful story, whether he or she attempted to conceal anything, whether there was a motive to testify

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falsely, whether there was any reason why the witness might color the testimony.

The ultimate question for you to decide in passing upon credibility or believability of a witness is: did the witness tell the truth here before you as to essential matter? It is for you to say whether a witness at this trial is truthful in whole or in part in the light of his or her demeanor, that is, his or her manner of testifying on all the evidence in the case.

The fact that a certain witness was a government employee does not entitle his testimony to any greater weight or consideration than that accorded to any other witness in this case. Nor does it entitle it to any lesser weight or consideration.

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You evaluate the testimony of such a witness the same way you do that of all other witnesses.

If you find that any witness -- and this applies to all witnesses -- has wilfully testified falsely as to any material matter, you may reject the entire testimony of that witness or you may accept such part as commends itself to your belief or which you may find corroborated by other evidence in the case.

Now the law permits but does not require a defendant to testify in his own behalf. Mr. Kelner has taken the witness stand. Obviously he has a deep personal interest in the result of this prosecution. Indeed, it is fair to say that he has the greatest stake in its outcome. Interest creates a motive for false testimony. The greater the interest the stronger the motive, and a defendant's interest in the result of his trial is of a character possessed by no other weight. In appraising his credibility you may take that fact into consideration.

However, and I say this equally strongly, it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful, candid and straightforward statement. It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.

Pgrf 2

The facts in this case may be proved either by direct or circumstantial evidence. It must be by one or the other. Direct evidence is what a witness testifies that he or she saw, heard, smelled, felt. It is an immediate reaction to something. It is the testimony of what one observes with one's own senses. That is direct testimony.

Circumstantial evidence is where facts are established from other facts which are properly proved for you and from which you may logically infer the ultimate facts sought to be established. Thus you go on the basis of reason and experience from an established fact to the next fact to be proved.

Circumstantial evidence if you credit it is of no less value than direct evidence.

Let me give you a homely example that I have heard judges give over many, many years. Let's suppose that when you came in this morning these blinds were all drawn as they have been on occasion. At the time you came in it was a sunny day. As you sat here, during the middle of the morning a man came in with a raincoat with drops of water on it. Another man came in with an umbrella and shook the water off it and put it up against the wall. You could conclude from those facts that since you had come into the building the sun

pgrf 3

had stopped shining and it had started to rain. That is all that is meant by circumstantial evidence.

You take one fact and by reason and experience can conclude another from it, logically.

In evaluating the evidence in this case I want to say that you the juror are interested not in the quantity of the evidence, that is just the sheer number of witnesses or exhibits, but you are obviously interested in the quality of the evidence that you have seen and heard.

Mr. Kelner has called several witnesses who have given testimony as to his character and reputation in the community for honesty, truthfulness, integrity and peacefulness. You should consider this evidence together with all other evidence in determining his guilt or innocence. Evidence of good reputation may in itself create a reasonable doubt where without such evidence no reasonable doubt would exist.

But, on the other hand, if from all the evidence you are satisfied beyond a reasonable doubt that Mr. Kelner is guilty, a showing that he previously enjoyed the reputation testified to does not justify or excuse the offense, and you should not acquit him merely because you believe he has been a person of good repute.

Your verdict with respect to the charge here

pgrf 4

must be unanimous. Your function -- as I have said before, but I want to repeat it again as a foundation for what I want to say here toward the close -- is to weigh the evidence and to determine the guilt or innocence of Mr. Kelner solely on the basis of the evidence in this case and these instructions on the law. Under your oath as jurors you may not allow and you cannot allow a consideration of any sentence that may be imposed upon a defendant if he is convicted to enter into your deliberations or to influence your verdict in any way.

Your duty is to decide the case solely and only upon the evidence. In the event of a conviction the duty of imposing sentence rests solely with the Court.

Each juror is entitled to his or her own opinion but each should however exchange views with fellow jurors. That is the very purpose of jury deliberation. That is what it is all about, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another, and to reach an agreement based solely and wholly upon the evidence if you can do so without violence to your individual judgments.

Each must decide the case for himself or herself after consideration and discussion with his or her

pgrf 5

fellow jurors. But you should not hesitate to change an opinion which after discussion with your fellow jurors appears to you in good conscience to be erroneous.

However, equally, if after carefully considering all the evidence, the arguments of your fellow jurors, if you then entertain a consciencious view which differs from the others, you are not to yield your conviction simply because you are outnumbered or outweighed.

The final vote must reflect your consciencious conviction as to how the issue should be decided.

The charge here is a serious charge and a just determination is important both to the public and to the defendant. Under your oath as jurors you must decide this case without fear or favor.

If the Government has failed to carry its burden it is your duty to acquit. If the Government has carried its burden you must not flinch from your sworn duty but you must convict.

Ladies and gentlemen, that concludes my charge on the law.

Gentlemen, is there anything you wish to take up with me in the robing room?

MR. BUCHWALD: No, your Honor.

MR. DECHTER: Yes, your Honor.

after the charge

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(In the robing room.)

THE COURT: Yes, sir.

MR. DECHTER: Your Honor, based upon the statements made by U. S. Attorney Buchwald and the Court, I ask for a motion here for a mistrial. The Attorney's statements regarding probation I believe were --

THE COURT: I can take that up when the jury is out.

Have you got any exceptions to the charge?

MR. DECHTER: The only other thing would have been that the charge seemed to me ambiguous regarding the defendant's position in taking the stand and a motive possibly to lie. The emphasis on that where it seems just the opposite. If he didn't take the stand is the one that the Court should have emphasized, he didn't have any reason to take the stand. Taking the stand should not imply anything at all other than to let the jury decide what his statements were and they would have that right to decide if he lied or if he didn't lie.

THE COURT: Your exception is noted.

MR. DECHTER: Thank you, your Honor.

MR. BUCHWALD: No exceptions.

(In open court.)

THE COURT: Mr. Metres and Mrs. Carter, it is

eorf 2

my duty at this time to excuse you with my thanks for your careful attention over these days that you have been with us and I appreciate your service.

(Alternate jurors left the courtroom.)

THE CLERK: Will the marshal step forward and raise your right hand, please.

(Marshal sworn.)

THE COURT: Will the jury please follow the marshal out.

(Jury retired to deliberate at 5:17 p.m.)

THE COURT: Gentlemen, we don't have that many exhibits, but let's get them together so they can be given to the jury should they be requested and I take it it can be stipulated that the clerk can do that without assembli everybody.

MR. BUCHWALD: Your Honor, to my knowledge there are only two exhibits other than the film.

THE COURT: Mr. Dechter, any objection to giving these to the jury along with the indictment if they request it?

MR. DECHTER: No.

THE COURT: I would also suggest that the technician have the machine set up in the event the jury were to ask to see it so we won't spend any time setting

corf 3

it up.

Mr. Dechter, do you want now to put on the record that statement that you began in the robing room and I feel you should put it on the record so you have made your record.

MR. DECHTER: I believe I did, but if it wasn't put into the record --

THE COURT: You objected to the Assistant's remarking about the power of the Court to sentence and the sentencing limits.

MR. DECHTER: Your Honor, regarding the statements made by U. S. Attorney Buchwald, they are absolutely incorrect by stating anything regarding probation. It was prejudicial and that in itself is prejudicial and I believe caused a problem for the jury insofar as making their verdict, and, therefor, I ask this Court to call for a mistrial on that basis, your Honor.

THE COURT: I seem to recall that in your summation you made some observation about when you are thinking -- something to the extent that in your deliberations you have got to keep in mind that if you convict you are sending this man away.

MR. DECHTER: You know what I am trying to imply, your Honor?

eorf 4

THE COURT: It seems to me that that opened the door to the comment that was made by the Assistant and that is why I permitted it.

MR. DECHTER: I believe if you peruse the record, let's get the minutes and let's peruse them. The fact remains, your Honor, that there was more than one time that the U. S. Attorney made remarks regarding the possible sentence.

What I am objecting to is not the sentence, but the use of the word "probation." What I mean by that is that if the jury --

THE COURT: Your inference to the jury was that if they convicted he necessarily would go to prison and Mr. Buchwald was counteracting that. There is nothing in the record to justify your statement.

MR. DECHTER: Your Honor, if I could continue, his statement was that probation, the person that talks about probation, then the jury could feel, well, I can convict him, he is not going to go to jail anyway. Let's give him probation. I feel that was prejudicial and in violation of the law and not fair to the jury.

THE COURT: I feel equally the other way that the statement that if you convict him he will go to prison has the reverse effect so I fail to see that there was error.

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MR. BUCHWALD: Your Honor, my statement, I believe, suggested that the alternatives were anything from probation to the maximum time chargeable under the statute.

Mr. Dechter's statement was that both of those alternatives were not available. It was also that the man's liberty was at stake.

There were comments in his opening and in his summation.

MR. DECHTER: The minutes speak for themselves and the record is made and the court can rule.

THE COURT: The motion is denied.

MR. DECHTER: Exception.

MR. BUCHWALD: Your Honor, if I might hand up and request that it be marked as a court exhibit the flier for the demonstration this afternoon which was the basis for my request that the jury be kept together during the lunch hour for the rally at Foley Square in front of the federal courthouse.

THE COURT: Yes. It will be marked as a court's exhibit. Also, the copy Mr. Dechter gave me the voir dire questions for the jury.

(Court's Exhibit 4 marked.)

MR. DECHTER: No. 1, that particular flier

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from my just general knowledge of what goes on in Jewish affairs, that is the Greater New York Conference on Soviet Jewry national group, which is led by District Attorney Eugene Gold, and has no connection with any organization of this group or Russell Kelner, and I felt and still believe that sequestering the jury, not because of the flier, only because I only hope that they did not get a wrong impression and that this flier has nothing at all to do with this group, as a matter of fact, this flier, if I understand them, was put out probably a month or two ago. They didn't plan it because of tiday.

THE COURT: I know, but, Mr. Dechter, do you seriously contend that this jury should have streamed out there? I went across to lunch in the Customs Courthouse lunchroom. I went across about 1 o'clock and there were probably at that time ahundred to 200 people right across from the courthouse. There was loudspeaker talk about the subject of this pamphlet. Among others who were observed by me as watching was one of the young ladies that I had occasion to speak to about shaking their heads when the witness Mr. Kelner was on the stand. She was in the back of the crowd.

Do you think that it was appropriate that

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the jury should be exposed to that with issues like this?

MR. DECHTER: You constantly ask me what s think.

THE COURT: I can't believe you are serious.

MR. DECHTER: But that is not my intention at all. It was completely in a different direction.

I am not saying anything at all about what the jury should see. That was never my thought. The thought was I am only concerned with what they believe was going on that they should be sequestered because I think that common knowledge is that people are not in the middle of a jury trial given a lunch period. That is all I was concerned with.

THE COURT: I instructed them a number of times to decide this case on the evidence and the law in this courtroom and I am confident that they have applied my instructions and that is that.

MR. DECHTER: Thank you, your Honor.

(Recess.)

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(At 5:36 a note was received from the jury.)

(Court's Exhibit 5 marked for identification.)

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(In open court, jury present.)

THE COURT: Madam Forelady, I have your note reading, "We would like Howe 875. Judges charge concerning character reference and we want the indictment. "

You will be furnished a copy of the indictment and I want to say that we are going to sit a few more minutes tonight. Not a great length of time, but a few more minutes.

875, Section 875-C of the law reads as follows:

"Whoever transmits in interstate commerce any communication containing any threat to injure the person of another shall be guilty of a crime."

Shall I read that again.

JUROR NO. 2: Please.

THE COURT: "Whoever transmits in interstate commerce any communication containing any threat to injure the person of another shall be guilty of a crime."

Now, my charge concerning character evidence reads as follows:

"Defendant Kelner has called several witnesses who have given testimony as to his character or perhaps

eorf 2

more correctly as to his reputation in the community for honesty, truthfulness, integrity and peacefulness.

"You should consider this evidence together with all other evidence in determining his guilt or innocence. Evidence of good reputation may in itself create a reasonable doubt where, without such evidence, no reasonable doubt would exist. But, on the other hand, if from all the evidence you are satisfied beyond a reasonable doubt that Mr. Kelner is guilty, a showing that he previously enjoyed the reputation of good character does not justify or excuse the offense and you should not acquit him merely because you believe he has been a person of good repute."

All right, you may retire, ladies and gentlemen of the jury.

(Jury retired to deliberate further at 6:47 p.m.)

MR. DECHTER: As far as I am concerned, speaking on behalf of myself as well as Russell Kelner, we are prepared, you know, to be here, but I don't want the Judge to in any way--whatever you want to do is fine with me.

THE COURT: You earlier made an application, tomorrow being the sabbath, to recess early. You made that application and I have taken that into consideration

corf 3

in making arrangements to recess at 7:00.

MR. DECHTER: Your Honor, I had not, by that application, indicated in any way what the jury should do. I am just indicating what Russell Kelner and myself wish. If I have to be here and am forced to be here, I will be here.

THE COURT: I am at a loss to know which way you are leaning at this point. In any event, I made arrangements at 7:00 o'clock.

MR. DECHTER: Fair enough.

THE COURT: You mentioned the defendant and his parents --

MR. DECHTER: His parents are unimportant. Kelner and I, if we were forced to stay, we would stay.

THE COURT: Mr. Buchwald, do you have any views given what you have just heard?

MR. BUCHWALD: I have some difficulty in following Mr. Dechter as well. Does that mean that there is no inconvenience or difficulty entailed in your staying later this evening?

MR. DECHTER: Regardless, if I am forced to stay or Mr. Kelner, we will stay. It doesn't mean anyone else, whoever else has to leave may leave. I don't want to influence the jury one way or the other.

eorf 4

THE COURT: Mr. Buchwald.

MR. BUCHWALD: My own preference, if it is all right with counsel and the defendant, would be to continue to have the jury deliberate tonight or at least to inquire of them what they would prefer.

THE COURT: We will continue for a while and then see what happens.

Mr. Dechter, given your view that you are willing to stay, I don't want the record to in any way indicate that either you or your client are being forced to stay. If you are using that language, act accordingly, but if you are willing to stay --

MR. DECHTER: It is not language. There is nothing technical about the language. I am willing to stay --

THE COURT: There is something that could be technically made out of that language and I am not going to accept that language.

MR. DECHTER: What should I say. Do you want to tell me what to say?

THE COURT: If you are prepared and it is your willingness and desire to continue deliberations here, I am prepared to do it.

You had earlier urged that we recess at 6:30

eorf 5

for religious considerations.

MR. DECHTER: For people within the group as well as some of the people involved.

THE COURT: I accepted that statement and I made arrangements for the jury to be transported home at 7:00 o'clock. Now --

MR. DECHTER: I am just saying I am willing to stay.

THE COURT: You no longer are urging that upon me and I am prepared to consider that.

MR. DECHTER: I am saying personally that I am willing to stay. I am speaking for myself and Mr. Kelner. Nothing else about anyone else, what you do at that point.

THE COURT: We will stay.

(Recess.)

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(Jury present at 7:20 p.m.)

THE CLERK: Members of the jury, you will answer present as your names are called.

(Jury roll called; all jurors present.)

THE CLERK: Madam Forelady, please rise. The jury has reached a verdict?

THE FORELADY: Yes, they did.

THE CLERK: What is that verdict?

THE FORELADY: Guilty.

THE CLERK: Be seated, please.

THE COURT: Poll the jury, please.

(Jury polled; all answer in the affirmative.)

THE CLERK: The verdict is unanimous.

THE COURT: Ladies and gentlemen, before I discharge you I want to thank you for the careful attention I observed you giving during the trial and the careful attention you have obviously given to the issues here, which were quite simple, and you spent quite a time in giving them consideration. I think you can take with you from this the knowledge that you served as true ministers of justice and have performed well the obligation of citizenship which I pointed out was to be yours in performing this service.

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You are discharged with my thanks.

(Jury excused.)

THE COURT: The spectators will please remain in the courtroom until the jurors have cleared the floor.

THE COURT: Mr. Dechter, do you want to reserve your time to make motions?

MR. DECHTER: Yes, your Honor. I also move to controvert this particular verdict as contrary to the evidence produced at trial. I ask the court to reverse the decision by the jury.

THE COURT: That motion is denied.

MR. DECHTER: In the alternative I move to stay the execution of judgment until there is sufficient time for an appeal and keep Mr. Kolner out on bail or on the same bail conditions that he has.

THE COURT: Let's get to all of those questions in turn. There cannot be any appeal until there has been a sentence and before there can be that I want to have a presentence report so I have the benefit of the Probation Department's report.

MR. DECHTER: Fair enough.

THE COURT: When should we set sentence? July 11th, at 2:15 in the afternoon.

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MR. DECHTER: I am going to check, your Honor.

Could it be the 9th or 10th, your Honor? That would be easier for me. Which day?

THE COURT: The 9th, at 2:15.

MR. DECHTER: Very good.

THE COURT: I will be in courtroom 501.

Mr. Buchwald, I assume there is no need for any increase in bail or any other such change?

MR. BUCHWALD: No, your Honor, the government makes no such application.

THE COURT: Mr. Kelner may be continue to be lodged on the same bail that he is on now?

MR. BUCHWALD: That is satisfactory to the government.

THE COURT: Very good.

Bail is continued as presently established.

MR. DECHTER: Most kind of your Honor.

THE COURT: All right. July 9th at 2:15, Room 501, for sentence.

(Adjourned to July 9, 1975, at 2:15 p.m.)

U.S.V. Kelner - Levin

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of Sept, 1975 deponent served the within appendix upon U.S. attorneys

attorney(s) for appellee

in this action, at U.S. Courthouse
Foley Sq
N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
18 day of Sept, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976